IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1332

CITY OF VANCEBURG, KENTUCKY - Petitioner

versus

FEDERAL ENERGY REGULATORY COMMISSION - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

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v.

FEDERAL ENERGY REGULATORY COMMISSION - - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner City of Vanceburg respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 28, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

This suit was brought under 16 U.S.C. § 825*l*(b) to modify two orders of the Federal Power Commission, now the Federal Energy Regulatory Commission. The

judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 28, 1977. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on December 22, 1977. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission, in assessing annual charges payable by a licensee under section 10(e) of the Federal Power Act for use of surplus water and water power from a Government dam, may impose a charge that is directly and solely attributable to a municipal licensee's constitutional tax immunity.

2. Whether a charge imposed pursuant to section 10(e) of the Federal Power Act which disregards the tax-exempt status of a municipality and thereby imposes a charge on the municipality more than two and one-half times greater than any other charge ever imposed by the Federal Energy Regulatory Commission for use of a United States dam, constitues an unreasonable charge in violation of section 10(e) of the Federal Power Act.

3. Whether the imposition of a charge pursuant to section 10(e) of the Federal Power Act for the use of a United States dam by a municipality, which is five times greater than the charge assessed against investor-owned utilities in similar circumstances, constitutes an unreasonable discrimination against municipal licensees and a violation of the requirement of section 7(a) of the Federal Power Act that the Commission "give preference to applications [for licenses] by States and municipalities."

STATUTORY PROVISIONS INVOLVED

Sections 4(e), 7(a), 10(a), and 10(e) of the Federal Power Act, 16 U.S.C. §§ 797(e), 800(a), 803(a), and 803(e), are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner City of Vanceburg ("Vanceburg") sought licenses under section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), to construct and operate two separate hydroelectric power projects at existing United States dams on the Ohio River. Project No. 2245 (the "Cannelton Project") was to be constructed in Hancock County, Kentucky, at the Army Corps of Engineers' Cannelton Locks and Dam. Project No. 2614 (the "Greenup Project") was to be constructed in Scioto County, Ohio, at the Army Corps of Engineers' Greenup Locks and Dam. Each project planned the construction of a powerhouse to utilize surplus water or water power from the Government dams.

On March 29, 1976, the Commission issued two separate orders granting Vanceburg the licenses it sought. Order Issuing License (Major), P-2245 (3/29/76), J.A. 1; Order Issuing License (Major), and Dismissing

Application for Preliminary Permit, P-2614 (3/29/76), J.A. 52.[1]

Section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), conditions the issuance of a license upon the Commission's determination "[t]hat the project adopted . . . be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and ultization of water-power development, and for other beneficial public uses."

The Commission's decision to award the licenses to Vanceburg was based in part upon its determination that each of the proposed projects was "economically feasible." The Commission found that a fossil fueled steam-electric plant that could provide capacity and energy equivalent to that of the Cannelton Project would cost $4,457,700 annually; the projected annual cost of producing power at the proposed Cannelton hydroelectric plant was estimated at only $3,970,300. Similarly, the Commission found that the cost of an alternative energy source to the Greenup Project amounted to $4,418,800 per year, while the projected annual cost of the hydroelectric Greenup Project was only $3,963,000. J.A. 8-9, 62-63.

These calculations, however, only governed the Commission's decision to issue the licenses to Vanceburg. Section 10(e) of the Act, 16 U.S.C. § 803(e), also required the Commission to fix three different types of charges to be paid by Vanceburg as licensee. First, Vanceburg was required by section 10(e) to pay to the United States "reasonable annual charges . . . for the purpose of reimbursing the United States for the costs of the administration" of the Federal Power Act. Second, Vanceburg was required to pay reasonable annual charges "for recompensing [the United States] for the use, occupancy, and enjoyment of its lands or other property." The reasonableness and propriety of these charges are not contested here.

A third type of charge generates this controversy. Section 10(e) of the Federal Power Act provides that "when licenses are issued involving the use of Government dams . . . the Commission shall . . . fix a reasonable annual charge for the use thereof. . . ." To determine the appropriate dam-use charge, the Commission employed its so-called "sharing-of-net benefits" method. *See, e.g., Montana Power Co.,* 25 F.P.C. 221 (1961), *aff'd* 298 F. 2d 335 (D.C. Cir. 1962); *Alabama Power Co.,* 36 F.P.C. 659 (1966); *Public Service Co. of Indiana,* 25 F.P.C. 1065 (1961); *Ohio Power Co.,* 50 F.P.C. 2020 (1973). The Commission subtracted the estimated annual cost of operating each hydroelectric project from the estimated annual cost of operating the least expensive alternative energy source, thereby computing the "net benefit" accruing to the licensee from use of each of the Government dams. The Commission then assessed against Vanceburg as annual dam-use charges one-half of each "net benefit" so determined.

[1] "J.A." refers to the Joint Appendix filed in the Court of Appeals and transmitted to this Court as part of the certified record. "App." will be used when citation to the Appendix to this petition is appropriate.

In computing these dam-use charges, the Commission included as a "benefit" from the use of a Government dam a substantial cost savings attributable solely and directly to the fact that Vanceburg is a tax-exempt municipality. As the Commission explained in its Order on Rehearing in the Cannelton Project: "The practical effect of our treatment is to exact one-half . . . of these tax savings as part of the reasonable annual charge for use of the Government dam." J.A. at 50; *see* Order on Rehearing, P-2614, J.A. at 112 (adopting same position with respect to the Greenup Project).

Because the Commission counted the cost savings attributable to Vanceburg's tax immunity as a "benefit" produced by use of a Government dam, and "exact[ed] one-half . . . of these tax savings as part of the reasonable annual charge for use of the Government dam," J.A. at 50, the annual dam-use charges assessed against Vanceburg increased six-fold. Annual dam-use charges ballooned from $35,050 to $243,700 for the Cannelton Project, and from $40,400 to $227,900 for the Greenup Project. App. 34, J.A. 41 (Cannelton), 110 (Greenup). These figures are more fully explained in the Appendix. *See* App. 57-58. For purposes of this statement of the case, suffice it to say that the calculations on which they are based have never been contested by the parties and were accepted as valid by the Court of Appeals. App. at 32 n.26.

As required by section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l*(a), Vanceburg sought relief from the dam-use charges imposed in the Commission's

licensing orders by filing timely petitions for rehearing and supplemental applications for rehearing on April 29 and May 14, 1976, respectively. J.A. 37, 39, 106, 108. The Commission granted rehearings on May 27, 1976, and on June 21, 1976 reaffirmed its Orders of March 29, 1976. J.A. 42, 111; 43, 112-113.

As a party "aggrieved by an order issued by the Commission," 16 U.S.C. § 825*l*(b), Vanceburg sought review of the Commission's orders in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals entered judgment affirming the Commission's orders on November 28, 1977 and denied a timely petition for rehearing and a suggestion for rehearing *en banc* on December 22, 1977.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises a Significant Constitutional Question Concerning the Scope of a Municipality's Immunity from Federal Taxation.

This is a case of first impression. The Commission has never before granted a license involving the assessment of dam-use charges against a tax-exempt municipal licensee. Since the Commission employs the sharing-of-net-benefits method in almost all dam-use cases, it can be expected that when licenses are granted to other tax-exempt municipalities in the future, they too will be assessed dam-use charges directly and solely attributable to their immunity from taxation, rather than to any particular benefit derived from the use of a Government dam.

The impact of the Commission's decision is rather startling. Of the $243,700 annual dam-use charge assessed against the Cannelton Project, 85.6 percent is directly and solely attributable to Vanceburg's tax immunity. Of the $227,900 annual dam-use charge assessed against the Greenup Project, 82.3 percent is directly and solely attributable to Vanceburg's tax immunity.

Although the once expansive boundaries of the doctrine of intergovernmental tax immunity have been retrenched, *see Helvering* v. *Gerhardt,* 304 U. S. 405 (1938) (sustaining federal income tax on salaries of employees of Port of New York Authority), it is still hornbook law that a tax imposed directly on a state or local government, just as a tax imposed directly on the federal government, is constitutionally impermissible. *E.g., New York* v. *United States,* 326 U. S. 572 (1946); *Collector* v. *Day,* 78 U. S. (11 Wall.) 113 (1871). In the instant case, the dam-use charge is imposed directly on a tax-exempt municipality. The question is whether, because so great a proportion of this charge is attributable solely and directly to Vanceburg's tax immunity, the Commission has violated Vanceburg's constitutional tax immunity.

The Commission has never disputed that it has assessed dam-use charges against Vanceburg that are directly and solely attributable to Vanceburg's tax immunity. Indeed, the Commission itself used stronger terms:

> Furthermore, our treatment does not, as Vanceburg suggests, collect as annual charges all the tax

> savings which Vanceburg would otherwise realize. The practical effect of our treatment is to exact one-half, not all, of these tax savings as part of the reasonable annual charge for use of the Government dam. (Order on Rehearing, P-2245 (6/21/76). J.A. 43, 50.)

We emphasize that the dam-use charges are unrelated to any cost incurred by the Government. *Cf. Payne* v. *Washington Metropolitan Area Transit Comm'n,* 415 F. 2d 902 (D.C. Cir. 1968) (Commission could not properly rely on value-of-service principle in setting fares as justification for refusing to analyze cost of providing services versus revenues generated.). They are designed by the Commission purely to garner for the Government one-half of a hypothetical benefit accruing to a licensee from the use of a Government dam as compared to an alternative fossil fuel source. This benefit, however, is not produced by any extra federal effort; rather, it is produced when a licensee properly utilizes surplus water and water power from a Government dam. Unless used by a licensee, that power would be wasted.

Conversely, there are no additional revenues generated for the licensee by the use of the Government dam. It is true that the licensee saves money by not having to construct an even more expensive fossil fuel source of power, but the actual effect of the sharing-of-net-benefits method is to raise the cost of power to consumers.

There is no dispute that the magnification of Vanceburg's annual dam-use charges is occasioned solely by

the Commission's refusal to recognize Vanceburg's tax immunity. But contrary to the Commission's contention that it is permissible to "exact" only one-half of Vanceburg's tax exemption, Order on Rehearing, P-2245 (6/21/76), J.A. 50, we believe that Chief Justice Marshall would have reached the same result in *McCulloch* v. *Maryland,* 17 U. S. (4 Wheat.) 316 (1819), even if the state had agreed to reduce its tax on the Bank of the United States by 50 percent.

In the Court of Appeals, two justifications for disregarding Vanceburg's tax-exempt status were advanced. First, the Commission contended that it would be "anomalous" to disregard tax immunity in determining economic feasibility and yet to afford Vanceburg the benefit of its tax immunity in computing dam-use charges.

This argument amounted to no more than pursuit of the hobgoblin of consistency, and was rejected by the Court of Appeals. The determination of economic feasibility as part of the section 10(a) comprehensive development inquiry is concerned in part with calculating the real opportunity costs of hydroelectric projects versus alternative energy sources. The object under section 10(e), on the other hand, is to compute a reasonable annual charge for the use of Government dams. As the Court of Appeals noted, "the validity of a particular set of charges must be ascertained by reference to the terms of section 10(e), not to the terms of section 10(a)." App. 40.

We hasten to point out, however, that even if Vanceburg's tax status had been discounted in the determination of economic feasibility under section 10(a), the two projects in question would still have been economically feasible, and the licenses would still have been issued to Vanceburg. Over the 50 year license period, the Cannelton Project, even if Vanceburg's tax immunity had been discounted, would still have represented a saving of $3,505,000 as compared to the least expensive fossil fuel alternative. *See* J.A. 41. The Greenup Project would still have represented a savings of $4,040,000 as compared to the least expensive fossil fueled alternative. *See* J.A. 110.

Moreover, comparison of the costs of alternative energy sources is only one of several factors considered by the Commission in making its determination under section 10(a) that a project is "best adapted" to a comprehensive plan for waterway and water power development. *See* J.A. 3-8, 59-62 (other factors considered by Commission in its licensing orders). Both projects use surplus water power that would otherwise be wasted rather than using yet another portion of our dwindling supply of fossil fuel: together, the hydroelectric projects conserve fuel resources equal to 1,020,000 barrels of oil annually. J.A. 9, 63. No competing application was filed with respect to the Cannelton Project; and with respect to the Greenup Project, the Commission specifically found that Vanceburg's application was "best adapted to develop, conserve, and utilize in the public interest the water resources of the region." J.A. 66, 80.

The Court of Appeals nevertheless upheld the Commission's order because it believed that the dam-use

charges were "fees" rather than "taxes." It is true, as the Court of Appeals pointed out, that section 10(e) of the Federal Power Act requires that at least some dam-use charge be imposed. The legislative history discussed at length by the Court of Appeals also clearly indicates that Congress intended that the dam-use charges in some way be related to the benefit conferred upon a licensee allowed to use surplus water power. Neither of these considerations, however, justifies the imposition of a dam-use charge that is traceable directly and solely to the constitutional tax immunity of a municipal licensee.

The contention that the dam-use charges are "fees" rather than "taxes" has more rhetorical than analytical appeal. Where "fees" are based directly and solely upon tax immunity and where the Commission has described its treatment of the dam-use charges in this case as an "exaction" of Vanceburg's tax savings, it is difficult to regard mere labels as dispositive. We doubt that the results in any of the intergovernmental tax immunity cases decided by this Court would have been different had the states or the federal government labeled the charges assessed against the other government involved as "fees" rather than "taxes." Although the Commission was talking "fees," it was actually levying "taxes."

Nor does the fact that Congress authorized the imposition of a system of compensatory fees under section 10(e) justify the Commission's action here. The conclusion that fees ought to be compensatory is easily reached by examination of the statute without regard

to the turbulent legislative history of the Federal Power Act. The question, however, is against what standard must a proper compensatory fee be determined. If a fee is determined primarily with reference to the tax immunity of a municipality, then that fee is not a fee in the nature of a charge to compensate the government for the use of surplus water power; it is a thinly disguised attempt to accomplish by indirect means what could not be accomplished directly.

II. The Decision Below Raises Significant Problems Concerning the Proper Application and Interpretation of the Federal Power Act.

A. *Reasonableness of the Dam-Use Charges.* As Table III of the Appendix shows, *see* App. at 56, the dam-use charges assessed against the Cannelton and Greenup Projects are more than two and one-half times as great as any other dam-use charge ever assessed by the Commission. Moreover, they are more than five times as great as the dam-use charges assessed by the Commission against two other Ohio River projects that the Commission itself designated as similar to the Cannelton and Greenup Projects. *See* Order Issuing License (Major) and Dismissing Application for Preliminary Permit, P-2614 (Greenup) (3/29/76), J.A. 52, 64 & n.3; App. at 56 (Table III) We submit that these differences are so disproportionate—because they derive directly from Vanceburg's tax-exempt status—that they constitute an unreasonable charge assessed in violation of section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e).

It is true that the informed and expert judgment of an administrative agency will ordinarily be accorded deference by a reviewing court. The rationale of that rule, however, is the presumption that the agency has acted in an area with which it is entirely familiar and upon which it has brought its accumulated expertise to bear. *E.g., North Carolina Utilities Comm'n* v. *F.C.C.*, 552 F. 2d 1036, 1049 (4th Cir. 1977). But because the dam-use charges assessed against Vanceburg involve a decision, *i.e.*, the proper scope of intergovernmental tax immunity, of a type never before made by the Commission, and with respect to which it has no particular expertise, the reasons for deference to agency decisionmaking are absent in this case. The question here does not involve the determination of a rate-base or the evaluation of the energy needs of a region; instead, it is a question of constitutional law. There is no reason to believe that the normal run of Commission decisions in any way permits it to speak with special authority as to whether a particular charge constitutes a dam-use fee or a constitutionally prohibited invasion of a municipality's tax immunity.

B. *The Preference for Municipal Licensees.* Section 7(a) of the Federal Power Act requires the Commission to "give preference" in the awarding of preliminary permits and licenses to states and municipalities. Vanceburg obtained a preliminary permit with respect to the Greenup Project due in part to this preference. *See Ohio Power Co.*, 38 F.P.C. 881 (1967). The Commission's decision to ignore the tax-exempt status of municipalities and to "exact" one-half of

their tax immunity as a "benefit" allegedly flowing from the use of a Government dam, directly contradicts the command of section 7(a). It might be argued that section 7(a) only deals with preferences in the issuance of preliminary permits or licenses. But surely the Commission cannot vitiate the statutory preference of section 7(a) by imposing conditions under section 10(e) which ensure that any municipal licensee will find the dam-use charges too onerous to justify seeking a preliminary permit or license.

C. *Section 7(a) and the* Conway *Doctrine.* The Commission's decision to increase Vanceburg's annual dam-use charges by nearly $210,000 with respect to the Cannelton Project and by nearly $188,000 with respect to the Greenup Project can only increase the costs that Vanceburg must charge its customers for power. Any such increase in costs will inevitably hamper Vanceburg's efforts to compete with investor-owned utilities for industrial customers, thereby restricting the efforts of the City of Vanceburg to attract new industry. By putting Vanceburg at a competitive disadvantage, vis-a-vis investor-owned utilities, the Commission has contravened the principle announced in *FPC* v. *Conway Corp.*, 426 U. S. 271 (1976). There, the Court held that the FPC could properly consider nonjurisdictional retail electric power rates in setting jurisdictional wholesale rates, in order to avoid an unreasonable discrimination and a price squeeze on wholesale municipal customers competing with power companies for retail industrial sales.

A similar reasoning is appropriate here. By imposing dam-use charges directly and solely attributable to Vanceburg's tax immunity, the Commission has saddled Vanceburg with substantial extra costs that hamstring the municipality's ability to compete with investor-owned utilities. The lesson of the *Conway* decision is that it is proper for the Commission, in assessing rates and charges, to consider the effect of a particular method of computing charges on the competitive position of section 7(a)'s statutorily-preferred municipalities.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

I. OPINION AND JUDGMENT OF COURT OF APPEALS

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1755

CITY OF VANCEBURG, KENTUCKY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 76-1756

CITY OF VANCEBURG, KENTUCKY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued 3 October 1977

Judgment Decided and Entered 28 November 1977

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of cost out of time.

James F. Falco with whom *Philip P. Ardery* and *Marlow W. Cook* were on the brief, for petitioner.

McNeill Watkins, Attorney, Federal Energy Regulatory Commission for respondent. *Drexel D. Journey,* General Counsel, *Robert W. Perdue,* Deputy General Counsel, *Allan Abbot Tuttle,* Solicitor and *Thomas M. Walsh,* Attorney, Federal Energy Regulatory Commission were on the brief, for respondent.

Before: BAZELON, *Chief Judge,* TAMM and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge:* Petitioner, the City of Vanceburg, Kentucky, ("Vanceburg") here seeks review of orders issued by the Federal Energy Regulatory Commission ("Commission") granting Vanceburg licenses to construct hydroelectric powerhouses at each of two Government navigation dams on the Ohio River and assessing against Vanceburg substantial annual rental charges for the use of these two dams. Petitioner contends that the charges assessed in these orders are excessive, unreasonable, and hence unlawful. After careful analysis of the pertinent provisions of the Federal Power Act ("the Act"),[1] the legislative history, and the relevant authorities, we conclude that Petitioner's contentions are either untimely or not well founded. We therefore affirm the Commission.

The controversy in this case centers on the method by which the Commission calculated the charges assessed in the orders; it is necessary to understand these calculations to apprehend the issues raised. Therefore in the ensuing discussion, we must describe these computations in some detail.

[1] 16 U.S.C. §§ 791a-823.

I. BACKGROUND

A. *Statutory Framework*

One of the main purposes of the Federal Water Power Act of 1920, which became Part I of the Federal Power Act in 1935, is to encourage the development of hydroelectric power. Section 4(e) of the Act[2] empowers the

[2] 16 U.S.C. § 797(e):
The Commission is authorized and empowered—

(e) *To issue licenses* to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to *any State or municipality* for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which the Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), *or for the purpose of utilizing the surplus water or water power from any Government dam,* except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall became a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation,

Continued

Commission to issue licenses to corporations[3] or municipalities[4] authorizing the construction and operation of generating and transmission facilities using surplus water or water power from existing Federal dams.

Section 10 of the Act imposes several conditions on the issuance of such licenses.[5] Two of these conditions are pertinent in this case: under Section 10(a), a proposed project must be *economically feasible;* under Section 10(e), a licensee must pay a *reasonable annual charge* for use of the Government dam. Around these two separate, but in some respects interrelated, considerations the issues in this case revolve.

Section 10(a) provides that the licenses are issued on the condition—[6]

> (a) *That the project adopted,* including the maps, plans, and specifications, *shall be such as in the judg-*

Continued

no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. (emphasis added).

[3]16 U.S.C. § 796(3):

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

[4]16 U.S.C. § 796(7):

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distribuing power;

[5]16 U.S.C. § 803.

[6]16 U.S.C. § 803(a) (emphasis added).

> *ment of the Commission will be best adapted to a comprehensive plan* for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, *for the improvement and utilization of water-power development,* and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

One factor considered by the Commission in judging whether a proposed project is "best adapted to a comprehensive scheme of . . . water power development" is the economic feasibility of the project.[7] The Commission's economic feasibility analysis generally has two parts. First, the Commission determines whether there is an adequate market for the power to be generated by a project; second, the Commission determines whether the estimated cost of developing a project is significantly lower than the estimated cost of developing suitable alternative sources.

Section 10(e) provides that licenses are issued on the condition—[8]

> (e) *That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission* for the purpose of reimbursing the United States for the costs of the administration of this subchapter; *for recompensing it for the use, occupancy, and enjoyment of its lands or other property;* and for the expropriation to the Gov-

[7]*See, e.g., Pacific Gas & Electric Co.,* 2 F.P.C. 300 (1940); *Fresno Irrigation District, Pacific Gas & Electric Co.,* 8 F.P.C. 348, 353-55 (1949). *See also, Municipal Elec. Ass'n of Mass.* v. *FPC,* 414 F. 2d 1206 (D.C. Cir. 1969).

[8]16 U.S.C. § 803(e) (emphasis added).

ernment of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission *shall seek to avoid increasing the price to the consumers of power by such charges,* and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That *when licenses are issued involving the use of Government dams* or other structures owned by the United States or tribal lands embraced within Indian reservations *the Commission shall,* subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, *fix a reasonable annual charge for the use thereof,* and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further,* That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed

capacity may be issued without charge, except on tribal lands within Indian reservations; *but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission.* In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

Under this provision, the Commission assesses three types of charges against corporate or municipal licensees authorized to use water power from existing Federal dams. First, annual charges are assessed to reimburse the United States for the costs of administering Part I of the Federal Power Act.[9] Second, annual charges are assessed to recompense the United States for the licensee's use, occupancy or enjoyment of Federal lands or other property (other than lands adjoining or pertaining to Government dams or other Government structures).[10] These two kinds of charges are not at issue in this case. Third, annual charges are assessed to compensate the United States for the use of Government dams or other structures owned by the United States, and for use of Federal lands adjoining such dams or structures. The charges at issue in this case are of this latter "dam-use" type.

Dam-use charges are governed by the Commission's regulations at 18 C.F.R. 11.22 which read in part:

> Reasonable annual charges for recompensing the United States for the use of Government dams or other structures owned by the United States, and for the use,

[9]These charges are governed by 18 C.F.R. 11.20.

[10]These charges are governed by 18 C.F.R. 11.21.

> occupancy, and enjoyment of the lands of the United States adjoining or pertaining thereto, will be *based upon the estimated value for power purposes* of the properties and privileges for which a license is issued. . . . (emphasis added).

One method commonly used by the Commission to compute these dam-use charges is called the "sharing-of-net-benefits method."[11] In *Alabama Power Co.*,[12] the Commission described the four step process which this formula involves. First, the licensee's annual cost of operating the proposed hydroelectric project is determined. Second, the annual cost of operating the least expensive (fossil fuel) alternative for producing equivalent energy is estimated. Third, the net benefit accruing to the licensee from use of the Government dam is computed by subtracting the former cost from the latter. Fourth, the licensee is assessed as an annual fee an amount equal to one-half of the difference between the former and the latter cost, thereby sharing equally between the United States and the licensee the net annual benefit resulting from use of the Government dam.[13]

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[11] *See, e.g.*, Order Modifying and Adopting Initial Decision of Presiding Examiner and Examiner's Further Decision Upon Reopened Hearing, *The Montana Power Co.*, Project No. 5, 25 F.P.C. 221 (1961), *rehearing denied* by order issued 24 March 1961, *affirmed, The Montana Power Co.* v. *FPC*, 298 F.2d 335 (D.C. Cir. 1962); *Alamaba Power Co.*, 36 F.P.C. 659 (1966); *See also, Public Service Co. of Indiana, Inc.*, 25 F.P.C. 1065 (1961); *Ohio Power Co.*, 50 F.P.C. 2020 (1973).

[12] 36 F.P.C. 659, 660 (1966).

[13] Thus, hypothetically, if the licensee's projected annual cost of operating the proposed hydroelectric plant is $3,000,000, and if the projected annual cost of operating a fossil fuel plant for producing equivalent energy is $4,000,000, then the "net benefit" accruing to the license from use of the Government dam is $1,000,000, and the annual dam-use charge would be $500,000 under the sharing-of-net benefits method.

B. *Factual and Procedural History*

1. *Vanceburg's License Applications*

The City of Vanceburg, Kentucky, a "municipality" within the meaning of the Federal Power Act,[14] has been engaged in a program to attract industry to its area. In order to obtain sources of low-cost electrical energy both for industrial consumers and area residents, Vanceburg sought licenses under Section 4(e) of the Act for two separate hydroelectric power projects at existing Government navigation dams on the Ohio River: (1) the Cannelton Project No. 2245,[15] and (2) the Greenup Project No. 2614.[16]

The proposed Cannelton Project was to be constructed in Hancock County, Kentucky, at the Army Corps of Engineers' Cannelton Locks and Dam. The proposed Greenup Project was to be constructed in Scioto County, Ohio, at the Army Corps of Engineers' Greenup Locks and Dam. For each project, Vanceburg proposed the construction of a powerhouse containing three hydroelectric units with a total installed capacity of 70,560 kW (70.56 MW). Both proposed powerhouses were to utilize surplus water or water power from their respective Government dams.

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[14] 16 U.S.C. § 796(7).

[15] For the Cannelton Project No. 2245, Vanceburg is a successor license applicant to Harrison County Rural Electric Membership Corporation ("HREMC"), an Indiana corporation, that had been issued a preliminary permit on 1 October 1958, and had subsequently applied for a license on 7 September 1961. On 8 September 1971, the Commission authorized the substitution of Vanceburg for HREMC as license applicant for the project.

[16] For the Greenup Project No. 2614, Vanceburg is an original license applicant. On 28 July 1966 it applied for a preliminary permit for the project, and this issued on 3 November 1967. On 12 December 1969 it applied for the project license.

2. *The Commission's 29 March 1976 Orders*

On 29 March 1976 the Commission issued two separate orders granting Vanceburg licenses for the two proposed projects.[17]

Pursuant to Section 10(a) of the Act, the Commission determined that each of the proposed projects was "economically feasible." This determination was based in part on a costing study which compared the projected annual costs of operating the proposed projects with the estimated annual costs of operating a hypothetical steam plant alternative. The order granting a license for the Cannelton Project stated:[18]

> Based on our studies, a fossil fueled steam-electric generating facility, which is the least expensive alternative energy source, could provide capacity and energy equivalent to that estimated to be generated at the project, at an annual cost of $4,457,700. The annual cost of producing power from the project is estimated to be $3,970,300. In light of the facts that the estimated cost of producing power from the project is less than the estimated cost of producing an equivalent amount of power from a suitable alternative and that an adequate market for the power has been demonstrated, we conclude that the project is feasible from an economic standpoint.

Similarly, the order granting a license for the Greenup Project stated:[19]

[17]Order Issuing License (Major) and Dismissing Application for Preliminary Permit, Project Nos. 2614 and 2704, issued 29 March 1976; Order Issuing License (Major), Project No. 2245, issued 29 March 1976. These orders are reproduced at Joint Appendix (J.A.) 52-90 and 1-21 respectively.

[18]J.A. 9.

[19]J.A. 63.

> Based on our studies, a fossil fueled steam-electric generating facility, which is the least expensive alternative energy source, could provide capacity and energy equivalent to that estimated to be generated at the project at an annual cost of $4,418,800. The annual cost of producing power from the project is estimated to be $3,963,000. In light of the facts that the estimated cost of producing power from the project is less than the estimated cost of producing an equivalent amount of power from a suitable alternative and that an adequate market for the power has been demonstrated, we conclude that the project is feasible from an economic standpoint.

In addition, as required by Section 10(e) of the Act, each order assessed annual charges against Vanceburg for the cost of administration, the use of Federal land, and the use of a Government navigation dam.[20] These latter dam-use charges were computed according to the sharing-of-net-benefits method. The Commission subtracted the estimated annual cost of operating each hydroelectric project from the estimated annual cost of operating the least expensive alternative, thereby computing the "net benefit" accruing to the licensee from use of each of the Government dams, and then assessed against Vanceburg as annual dam-use charges one half of each net benefit. *In computing these charges, the Commission employed the same cost figures that it had used in determining the economic feasibility of the respective projects*—whence arises this controversy. It set forth in detail these computations in an appendix to each order.[21]

With respect to the Cannelton Project No. 2245, the Commission assessed an annual dam-use charge of $243,700.

[20]J.A. 21; 89.

[21]J.A. 22; 91. The appendix for the order licensing the Cannelton Project is reproduced in Note 22.

The Commission's full calculations are set forth and explained in the margin,[22] but, briefly, this figure was arrived at as follows:

[22] "Appendix A" to the Commission's 29 March 1976 order licensing the Cannelton Project reads as follows (J.A. 22):

APPENDIX A

Computation of New Power Benefits.
Cannelton Project No. 2245

1. Cannelton Hydroelectric Project No. 2245

Installed Capacity 70.56 MW	
Est. Average Annual Generation 340 GWh	
Est. Dependable Capacity 32.5 MW	
Estimated Capital Cost, 1/75 $33,914,000	
Est. Power Supplied to U.S. Government	
Energy — 0.648 GWh	
Capacity — 0.394 MW	
Estimated Annual Cost	
Fixed (33,914) (.1126)	$3,818,700
O & M & A & G	146,000
FPC Annual Charge	5,600
Total	$3,970,300

2. Steam Electric Plant Alternative

(2,500 MW Units w. Cooling Towers)

Estimated Capital Cost (1/75)	$/kW
Steam Plant	363.74
Transmission	49.70
Total	413.44
Estimated Annual Cost	
Fixed ($413.44) x 0.1181	48.83
O & M A & G	2.63
Fuel, fixed & inventory	4.72
Total	56.18
Estimated Variable Cost	7.91 mills/kWh

3. Estimated Annual Value

Capacity[1] (31,960-394) kW x $56.18/kW	=	$1,773,400
Energy (340,000-648) MWh x $7.91/MWh	=	$2,684,300
Total		$4,457,700

Continued

Step 1. Estimate annual cost of operating Cannelton hydroelectric project	$3,970,300
Step 2. Estimate annual cost of operating hypothetical steam plant alternative	$4,457,700
Step 3. Calculate net benefit accruing to licensee Vanceburg ($4,457,700 — $3,970,300)	$ 487,400
Step 4. Assess one half of net benefit as annual charge	$ 243,700

With respect to the Greenup Project No. 2614, the Commission assessed an annual dam-use charge of $227,900. The Commission's calculations closely paralleled those made for the Cannelton Project:[23]

Continued

4. Estimated Net Power Benefit

$4,457,700 — $3,970,300 = $487,400

[1] $\frac{\text{Hydro adjustment}}{\text{dependable capacity}} \times \frac{\text{probability of meeting load-hydro}}{\text{probability of meeting load-steam}}$

$$32{,}500 \times \frac{0.87771}{0.89257} = 31{,}960$$

These computations were not fully explained to the Court either in the briefs or at oral argument. However, as we understand them, the Commission arrived at an estimated annual cost for operating the hydroelectric project by determining that the licensee would be required to pay the capital cost of the project ($33,914,000) at an annual rate of 11.26%. In other words, the Commission estimated that each year the licensee would pay as fixed costs 11.26% of $33,914,000. The 11.26% included fixed charge rate of 10.80% for cost of money, 0.06% for amortization, 0.20% for interim replacement, 0.10% for insurance and 0.10% for miscellaneous tax. (J.A. 114). Similarly, the Commission determined that the annual fixed cost of operating the hypothetical steam plant alternative would be 11.81% of the estimated capital cost of the project. Other costs, such as maintenance costs, were then added to these fixed costs, determining the total annual operating costs for each kind of project.

[23] J.A. 91.

Step 1. Estimate annual cost of operating Greenup hydroelectric project	$3,963,000
Step 2. Estimate annual cost of operating hypothetical steam plant alternative	$4,418,800
Step 3. Calculate net benefit accruing to licensee Vanceburg ($4,418,800 — $3,963,000)	$ 455,800
Step 4. Assess one half of net benefits as annual charge	$ 227,900

In sum, then, the Commission's 29 March 1976 orders granting licenses to Vanceburg for the two proposed hydroelectric projects were based on a costing study which calculated the cost differential between the proposed hydroelectric projects, on the one hand, and steam plant alternatives on the other. The costing study arrived at cost differential figures of $487,400 and $455,800 for the Cannelton and Greenup projects respectively. These figures theoretically represented the cost savings which the licensee would achieve from using the government dams, and they were used by the Commission for two purposes: first, to ascertain the economic feasibility of the projects under Section 10(a) of the Act; and second, to serve as the basis for computing annual dam-use charges under Section 10(e) of the Act.

3. *Vanceburg's Applications for Rehearing*

Disputing the validity of the dam-use charges assessed in the Commission's 29 March 1976 licensing orders, Vanceburg filed with the Commission, on 29 April and 14 May 1976 respectively, applications and supplemental applications for rehearing.[24] In its supplemental applications, Vanceburg contended that the assessed charges were unlawful because they were computed in a way which improperly

[24]J.A. 37; 39; 106; 108.

deprived Vanceburg of the advantage of being a tax-exempt municipality.[25]

Specifically, Vanceburg pointed out that in computing the net benefits, from which the dam-use charges were derived, the Commission had not included any income tax cost in estimating either the annual costs of operating the proposed hydroelectric projects or the annual costs of operating the hypothetical steam plant alternatives. The Commission had excluded such costs because its costing studies were based on "real costs," that is, costs which would actually be incurred by a licensee, and Vanceburg, by virtue of its tax-exempt status, would not in fact incur income tax costs in operating either the hydroelectric or fossil fuel plants.

However, Vanceburg observed that an investor-owned utility, in the same position as Vanceburg, would incur annual income tax costs in operating the hydroelectric or steam plants, and it estimated that these annual tax costs would be equal to about 2% of the estimated capital costs of the plants. Vanceburg then demonstrated that if the dam-use charges were recomputed according to the sharing-of-net-benefits method with the 2% tax factor included as part of the annual costs of the proposed hydroelectric projects and the steam plant alternatives—as it would be for an investor-owned utility—then the cost differentials between the comparative projects were substantially reduced, and, therefore, the annual charges were significantly

[25]J.A. 39; 108. In its applications, Vanceburg also requested an exemption from annual charges to the extent power was to be used for municipal purposes under the second proviso of Section 10(e). This request was premature. Under Commission regulations, such requests are to be made once the project begins generating power. These requests must be filed annually and must be accompanied by adequate supporting information. *See*, 18 C.F.R. § 11.24. In its "Orders on Rehearing", the Commission thus found that this exemption request was not properly before it. J.A. 45. Vanceburg has not challenged this conclusion in the instant appeal.

lower. These results were illustrated in appendices to Vanceburg's supplemental rehearing applications. One of these appendices is set forth in the margin,[26] but the following table reflects their significant features:

[26]The Appendix to Vancebeurg's supplemental application for rehearing on the Commission's Cannelton licensing order (J.A. 41) reads as follows:

EXAMPLE OF CALCULATION TO ILLUSTRATE EFFECT OF INCOME TAXES ON NET POWER BENEFITS

Computation of Net Power Benefits, Cannelton Project No. 2245

	Appendix A to Order		Calculation Using 2% Annual Cost to Represent Effect to Income Taxes
1. Cannelton Project No. 2245			
Installed Capacity 70.56 MW			
Est. Average Annual Generation 340 GWh			
Est. Dependable Capacity 32.5 MW			
Estimated Capital Cost, 1/75 $33,914,000			
Est. Power Supplied to U.S. Government			
Energy — 0.648 GWh			
Capacity — 0.394 MW			
Estimated Annual Cost			
Fixed (33,914) (.1126)	$3,818,700	x 0.1326	$4,497,000
O & M & A & G	146,000		146,000
FPC Annual Charge	5,600		5,600
Total	$3,970,300		$4,648,600
2. Steam Electric Plant Alternative			
(2-500 MW Units w. Cooling Towers)			
Estimated Capital Cost (1/75)	$/kW		
Steam Plant	363.74		
Transmission	49.70		
Total	413.44		
Estimated Annual Cost			
Fixed $(413.44) x 0.1181	48.83	x 0.1381	57.10
O & M A & G	2.63		2.63
Fuel, fixed & inventory	4.72		4.72
Total	56.18		64.45
Estimated Variable Cost	7.91	mills/kWh	
3. Estimated Annual Value			
Capacity[1] (31,960-394) kW x $56.18/kW	= $1,773,400	x $64.45	= $3,034,400
Energy (340,000-648) MWh x $7.91/MWh	= $2,684,300		= $2,684,300
Total	4,457,700		$4,718,700

Continued

	Calculations Used in 29 March Orders—No Tax Cost Included	Calculations Using 2% Annual Cost to Represent Income Tax Effect
A. *Cannelton Project:*		
1. Estimated Annual Cost of Proposed Hydroelectric Project	$3,970,300	$4,648,600

Continued

4. Estimated Net Power Benefit

$4,457,700 — $3,970,300 = $487,400

$4,718,700 — $4,648,600 = $ 70,100

[1]Hydro adjustment / dependable capacity x probability of meeting loan-hydro / probability of meeting loan-steam

$32{,}500 \times \frac{0.87771}{0.89257} = 31{,}960$

The significant figures are doubly underlined. By adding hypothetical income tax costs to the Commission's fixed charge rates, Vanceburg has raised those rates by 2%—from 11.26% to 13.26% for the hydroelectric project and from 11.81% to 13.81% for the steam plant alternative. Using these higher fixed charge rates increases the annual fixed costs for both the hydroelectric project and the steam plant alternative. However, the higher fixed charge rates produce a much greater increase in the costs of the hydroelectric project than they do in the steam plant alternative. This is so because, in the case of the hydroelectric project, the fixed charge rate of 13.26% is multiplied by the whole estimated annual cost figure of $33,914,000; whereas, in the case of the steam plant, it appears that the impact of the higher fixed charge rate of 13.81% is lessened by the presence of a substantial constant in both the Commission's and Vanceburg's valuation of the annual costs. This constant is represented by the figure $2,684,300 for "Energy" in step "3" of the calculations.

We do not understand the distinction between "Capacity" and "Energy" in step "3", and, therefore, we do not understand what this constant represents. However, neither party contests this portion of the calculation, and we have no reason to doubt its validity. Nor do we think these particular details are necessary to an understanding of the case. The important point is that the higher fixed charge rates of 13.26% and 13.81% increase the costs for the hydroelectric project more than they do the costs of the steam plant, and this has the effect of reducing the cost gap between the two kinds of projects.

	Calculations Used in 29 March Orders—No Tax Cost Included	Calculations Using 2% Annual Cost to Represent Income Tax Effect
2. Estimated Annual Cost of Hypothetical Steam Plant Alternative	$4,457,700	$4,718,700
3. Net Benefit	$ 487,400	$ 70,100
4. Annual Charge	$ 243,700	$ 35,050
B. Greenup Project:		
1. Estimated Annual Cost of Proposed Hydroelectric Project	$3,963,000	$4,639,900
2. Estimated Annual Cost of Hypothetical Steam Plant Alternative	$4,418,800	$4,720,700
3. Net Benefit	$ 455,800	$ 80,800
4. Annual Charge	$ 227,900	$ 40,400

Thus, in the right-hand column, where a tax cost is included as it would be for an investor-owned utility, the cost savings or "net benefits" to be shared are only $70,100 and $80,800, yielding annual charges of $35,050 and $40,400 respectively. However, in the left-hand column, where no tax cost is included, as it was not in the Commission's licensing order on account of Vanceburg's tax-exempt status, the cost savings or "net benefits" to be shared are substantially increased to $487,400 and $455,800, yielding annual charges of $243,700 and $277,900 respectively.

Acknowledging that as a municipality it would not actually incur tax costs, Vanceburg argued, nevertheless, that the Commission was required to include imaginary tax costs in its computations in order to measure properly

the benefits, in the form of cost savings, actually accruing to Vanceburg from the use of Government dams. *Vanceburg contended that the exceedingly high net benefit figures achieved by excluding tax costs did not represent cost savings accruing to Vanceburg from the use of Government dams, but rather represented mainly tax savings conferred on Vanceburg by Federal and state tax statutes.* Thus, in Vanceburg's view, the tax savings which resulted from its tax-exempt status were not part of the cost savings, or "net benefit," derived from the dams and, therefore, could not be "shared" by the Government. By excluding tax costs, Vanceburg asserted, the Commission was unlawfully attempting to write itself in on these substantial tax savings.

Stating that it would lose the advantage of being a municipality unless the Commission included imaginary tax costs in its dam-use charge calculations, Vanceburg concluded its supplemental rehearing applications by praying that the Commission recalculate the charges, "giving Vanceburg full advantage of its municipality status."[27]

4. *The Commission's Orders on Rehearing and the Instant Appeal*

On 27 May 1976 the Commission issued orders granting rehearings for the purpose of considering the issues raised by Vanceburg in its applications and supplemental applications.

In Orders on Rehearing issued 21 June 1976[28] the Commission addressed the issues raised by Vanceburg and rejected on several grounds Vanceburg's contention that

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[27] J.A. 40; 109.

[28] "Order on Rehearing, Project No. 2245," issued 21 June 1976, supplemented 3 August 1976 (Cannelton), reproduced at J.A. 43-51; 113-114. "Order on Rehearing, Project Nos. 2614 and 2704," issued 21 June 1976, supplemented 3 August 1976 (Greenup), reproduced at J.A. 112, 113-114.

the Commission's failure to include imaginary tax costs in computing dam-use charges improperly deprived Vanceburg of its tax-exempt status.

First, the Commission stated that it would be "anomalous" to consider Vanceburg's tax exempt status when determining the economic feasibility of a propect, a treatment which benefits Vanceburg by magnifying the projected cost savings; but then to ignore Vanceburg's tax-exempt status, and treat Vanceburg as an investor-owned utility when computing annual charges.[29]

Second, the Commission stated that, in order to be reasonable, dam-use charges must be based upon the real status of each specific license and that "to treat Vanceburg as an investor-owner utility for the purpose of computing annual charges is to give substance to a fiction."[30]

Finally, the Commission noted that the assessed annual charges did not nullify Vanceburg's tax exemption, but merely required Vanceburg to exchange part of its tax savings for the benefit of using a Government dam. It concluded that the sharing-of-net-benefits method was properly applied in this case and that it uniformly required all licensees, tax-exempt or not, to pay one half of the value to them of using Federal property.[31]

The Orders on Rehearing thus concluded that Vanceburg had failed to present any facts or legal arguments that required any modification of the Commission's licensing order of 29 March 1976.[32] These appeals followed and were consolidated by order of this court on 14 September 1976.

II. The Issues

In its petition for review before this Court, Vanceburg challenges the lawfulness of the dam-use charges assessed

[29] J.A. 50.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 51.

in the Commission's 29 March 1976 orders on essentially three grounds.

First, Vanceburg contends that the formula employed by the Commission in computing the assessed charges was not the proper sharing-of-net-benefits method because (a) it used the same costing data developed in the economic feasibility studies,[33] (b) it determined the "gross" benefits rather than the "net" benefits,[34] and (c) it arbitrarily apportioned the benefits on a 50%-50% basis.[35]

Second, Vanceburg argues that the assessed dam-use charges include tax savings conferred on Vanceburg by Federal and state tax laws, and, to the extent that the charges include such tax savings, they are unauthorized by the Federal Power Act, unreasonable, and "possibly" unconstitutional.[36]

Finally, Vanceburg asserts that the assessed charges are unauthorized by the Federal Power Act to the extent they exceed the charges which would be assessed an investor-owned utility, in the same position as Vanceburg, because higher charges discriminate against municipalities and, thereby, frustrate the purpose of the Act by deterring municipalities from developing hydroelectric power.[37]

We conclude that Vanceburg's first contention is not timely and that its second and third contentions are not meritorious.

A. *Vanceburg's Contention Regarding the Commission's Failure Properly to Use Net Benefits Formula*

We need not analyze at length Vanceburg's argument that the commission did not properly employ the sharing-of-net-benefits method, for it was not timely made.

[33] *See* Brief of Petitioner, 18.
[34] *Id.* at 19-20.
[35] *Id.* 24.
[36] *Id.* 25-38.
[37] *Id.* 38-50.

Section 313(b) of the Federal Power Act provides that any party aggrieved by an order of the Commission may seek review in this court.[38] However, the statute further provides that no objection to an order of the Commission may be considered on review unless the same objection was first *specifically* raised in an application for rehearing directed to the Commission.[39] As the Supreme Court has stated, it is the purpose of this provision to give the Commission notice of its alleged errors so that it may have the opportunity to correct them.[40] This provision reflects the principle that one must exhaust administrative remedies before resorting to judicial review.[41] This court has consistently adhered to this requirement.[42]

Vanceburg's contention concerning the Commission's improper application of the sharing-of-net-benefits method, was not "specifically" set forth in Vanceburg's applications for rehearing, original or supplemental, as required by Section 313(a) of the Act; nor was it even raised implicitly in these filings. There is simply nothing in Vanceburg's applications which could be expected to call the Commission's attention to this alleged error. Indeed, with the exception of the treatment of tax costs, Vanceburg implicitly approved the Commission's methodology by requesting the Commission to recalculate the dam-use charges according to its formula but using a 2% tax factor.[43] We find, therefore, that this issue has not been timely raised, and this court may not now consider it on appeal.

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[38] 16 U.S.C. § 825*l*(b).

[39] 16 U.S.C. § 852*l*(a) and (b).

[40] *FPC* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 498 (1955). *See also State of North Carolina* v. *FPC*, 533 F.2d 702, 705 (D.C. Cir. 1976); *Rhode Island Consumers Council* v. *FPC*, 504 F.2d 203, 212 (D.C. Cir. 1974).

[41] *FPC* v. *Colorado Interstate Gas Co.*, 348 U. S. 492 (1955).

[42] *See, e.g.*, cases cited at note 40 *supra*.

[43] J.A. 40; 109.

B. *Vanceburg's Contention Regarding the Commission's Treatment of Income Tax Costs in Computing Dam-Use Charges*

The second, and most substantial, objection to the dam-use charges raised by Vanceburg in this appeal is the same one it urged before the Commission in its supplemental applications for rehearing. Essentially, Vanceburg argues that the Federal Power Act does not authorize the Commission, in computing dam-use charges for a tax-exempt municipality, to consider the magnifying effect which the municipality's non-payment of taxes has on the cost savings which the municipality will derive from use of a Government dam. Moreover, Vanceburg argues that by treating tax savings as part of the cost savings accruing to it from the use of Government dams, the Commission is levying a tax on Vanceburg—a tax which is unauthorized by the Federal Power Act and violative of the doctrine of intergovernmental tax immunity.

We have carefully considered the language of Section 10(e) of the Act, the legislative history of that provision, and the relevant authorities and have concluded that the dam-use charges assessed thereunder are "fees" and not "taxes"; *that the Commission is authorized to base such fees on the actual value of the benefit bestowed on the specific licensee;* and that, in measuring the actual value of such benefit, *the Commission may consider real costs, including real tax costs.*

1. *Section 10(e): A System of Compensatory Fees*

In its Orders of Rehearing and on this appeal, the Commission has argued that it would be "anomalous" to consider Vanceburg's tax exempt status when determining the economic feasibility of the project (a treatment which magnifies the prospective cost savings and thus favors Vanceburg and its application), but then to ignore Vance-

burg's tax-exempt status when determining annual charges (a treatment which reduces the prospective cost savings and thus benefits Vanceburg by lowering the charges). The contention seems to be that for the sake of consistency, the calculations used in determining economic feasibility *must* also be used in computing annual charges. However, this does not *necessarily* follow. Section 10(a) and Section 10(e) have distinct purposes. The object under Section 10(a) is to calculate the real cost savings which would result from the hydroelectric project. The object under Section 10(e) is to compute *reasonable* annual charges for the use of government dams. Thus, the validity of a particular set of charges must be ascertained by reference to the terms of Section 10(e), not to the terms of Section 10(a). In this case the Commission has used the real cost savings calculated under 10(a) as the basis for charges under 10(e). The issue presented, therefore, is precisely whether this was an appropriate basis for the charges assessed. This issue can only be resolved through careful analysis of the Commission's mandate under Section 10(e).

Section 10(e) of the Act clearly authorizes the Commission to exact certain charges from those granted licenses to use water power from Government dams. The theory behind such charges is that, by issuing the license, the Government has conferred a benefit on the licensee. However, this provision does not confer on the Commission unlimited discretion to levy any charge it sees fit regardless of the value of the benefit conferred on the licensee. Section 10(e) was not intended to be a general revenue-raising statute. The language of the Section expressly states that the licensee shall pay the Government annual charges for the purpose of "*recompensing* it for the use, occupancy and enjoyment of its lands or other property,"[44] and, adverting specifically to the use of Government dams, it states that the Commission shall fix annual

[44]16 U.S.C. §803(e) (emphasis added).

charges "for the use thereof."[45] We view this language as evidencing Congress' intent that charges assessed for the use of Government dams should be compensatory in nature. Thus, Section 10(e), as we read it, establishes a system of compensation; dam-use charges are to be levied for the purpose of compensating the Government for the benefit it has conferred on the licensee. The concept behind compensation is that the charge exacted should be equivalent, or at least proportionate to, the value of the benefit conferred.

In *National Cable Television* v. *United States*,[46] the Supreme Court made a distinction between "taxes" and "fees":[47]

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. . . . A "fee" connotes a "benefit". . . .

It is clear that the dam-use charges under Section 10(e) are not "taxes" but "fees."[48] They are charges exacted

[45]*Id.*

[46]415 U. S. 336 (1974).

[47]*Id.* at 340-41 (footnote omitted). *See also FPC* v. *New England Power Co.*, 415 U. S. 345 (1974).

[48]Vanceburg contends that the charges required by the Commission's orders are unconstitutional taxes which violate the doctrine

Continued

against a licensee in exchange for a privilege which the licensee has requested or applied for and from which the licensee derives a special benefit. Our analysis above, however, indicates that Section 10(e) dam-use charges are not just "fees"; they are compensatory fees, and as such they must be proportionate to the value of the benefit for which they are exchanged.

To this point, we have relied solely on the statutory language itself in construing Section 10(e) as establishing a system of compensatory fees. However, the legislative history of Section 10(e) strongly supports our interpretation. During Congressional consideration of the Water Power Act of 1920, the matter of appropriate charges for hydroelectric project licenses was a central issue between the House and Senate. In the debates, a distinction was made between the case in which the licensee is granted permission to use water or water power from an existing Federal dam, on the one hand, and the case in which the licensee is merely granted permission to build from scratch its own dam for power purposes on a navigable waterway. In the former case, there appears to have been agreement between the House and Senate that compensatory charges were appropriate, for there was no question but that a substantial benefit was flowing from

Continued

of intergovernmental tax immunity. In making that argument Vanceburg ignores the fact that the charges under Section 10(e) are not taxes but user fees. As a sovereign the Government levies taxes, but as a property owner it may charge fees for the use of its property. Acting as the Government's agent, pursuant to Section 10(e), the Commission sets and collects fees for the use of Government property. These fees are paid *by choice and in exchange for a particular benefit,* the use of specific Government property, just as rents are freely paid for the use of private property. Taxes, in contrast, are imposed by the sovereign without regard to choice or particular benefit. Consequently, we believe Vanceburg's position that the contested charges are unconstitutional taxes is untenable. *Cf. National Cable Television* v. *U. S.*, 415 U. S. 336 (1974); *FPC* v. *New England Power Co.*, 415 U. S. 345 (1974).

the Government to the licensee.[49] In the latter case, however, there was disagreement between the House and Senate as to the propriety of charges. The Senate took the position that, in such a case, there was no real benefit flowing from the Government to the licensee for which the Government could justly exact compensation, for in its view, the water rights were vested in the States and the Federal interest was only in protecting and controlling navigation.[50] This view was cogently stated by Senator Nelson during the floor debates:[51]

> There are two classes of dams. Where a dam is constructed by the Federal Government for purposes of navigation, and there is a surplus power to be disposed of that ought to be utilized, in that case the Federal Government having constructed the dam, and by the construction of it having created a water power, *manifestly the Government is enitled to full compensation for the use of that power.* But where the Government has simply issued a license to a man, giving him permission to build a dam with his own money, his own capital, his own resources; in that case I have always believed, and that has been the view of the majority of the Senate, that the Government is not fairly and equitably entitled to any pay for the use of the water. If any compensation is to be made for the use of the water, it belongs to the States or to the riparian owners.

The House, however, took the position that where Congress grants a right to obstruct navigation it has the right to impose as a condition such charges as it deems fit.[52]

[49] *See, e.g.*, 59 Cong. Rec. 1041 (1919-1920) (remarks by Senator Nelson); *Id.* at 1100-01 (remarks by Senator Lenroot).

[50] *See, e.g., Id.* at 1039-42; 1571-72.

[51] *Id.* at 1041 (remarks by Senator Nelson) (emphasis added).

[52] *See, e.g., Id.* at 6524 (remarks by Mr. Esch).

Reflecting this philosophy, the House version of the Water Power Act conferred virtually unlimited authority on the Commission to exact charges from licensees under Section 10(e). It read simply that licenses were issued on the condition[53]

> (e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission.

The Senate criticized this provision in its report:[54]

> One substantial amendment relates to the power given the commission to impose charges upon the licensee to put in power development works. The House provision reads as follows:
>
> *'That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission.'*
>
> Whether the charge is to be for Government land used, for the mere granting of the permit, or for something else is not stated. It is practically a grant of unlimited power to the commission to levy such tax as it sees fit to impose, and, while the charge must be reasonable, there is no rate laid down upon which its reasonableness is to be determined. It is a blanket power to tax that should be given to no administrative body.

The Senate adopted a version which attempted, first, to ensure that all charges under Section 10(e) would be limited to the purpose of reimbursing the Government for costs it incurred or compensating the Government for some prop-

[53]H.R 3184, 66th Cong., 1 Sess. § 10(e) (1919), quoted at 59 Cong. Rec. 6524 (1920).

[54]S. Rep. No. 180, 66th Cong., 1st Sess. 1-2 (1919).

erty right or privilege from which the licensee derived a special benefit, and, second, to set a ceiling on the charges which could be exacted. The Senate's language read:[55]

> That the licensee shall pay for the license herein granted such reasonable annual charges as may be fixed by the commission *for the purpose of reimbursing the United States* for the cost of administration of the act in relation to water powers developed under its jurisdiction, in the proportion that the water power developed by the project covered by said license bears to the total water power developed by all projects licensed under the act, and for that purpose such charges may be readjusted from time to time, not oftener than once in two years; *the licensee shall also pay for the use, and occupation of any public lands* and lands in reservations, except tribal lands embraced within Indian reservations, necessary for the development of the project covered by the license such reasonable annual charges *based upon the actual value of the Government lands used* as may be fixed by the commission; but in no event shall the annual charge for the foregoing exceed 25 cents per developed horsepower: *Provided,* That *when licenses are issued involving the use of Government dams or other structures owned by the United States,* or tribal lands embraced within Indian reservations *the commission shall fix a reasonable annual charge for the use thereof* and such charges may be readjusted at the end of 20 years after the beginning of operations and at periods of not less than 10 years thereafter in a manner to be described in each license.

The conferees did not accept in full either the Senate or House provisions in their report, but recommended a

[55]*See,* 59 Cong. Rec. 1572, (1920) (emphasis added).

substitute. The compromise was adopted and is reflected in the existing statute.[56] Although the Senate did not succeed in placing ceilings on charges, the present provision does reflect the Senate's view that charges should be compensatory in nature and, hence, proportionate to the value of the benefit conferred.

2. *Valuation of Benefits Under Section 10(e).*

Because compensatory fees must be proportionate to the value of the benefit conferred, the valuation of the benefit is an essential predicate to fixing proper charges for the use of a Government dam under Section 10(e). Methods of valuation, of course, must vary with the nature of the benefit under consideration, for there are many ways in which the value of a particular benefit can be measured. The cost to the benefactor, the value to the beneficiary, the market or replacement value—all of these are appropriate measures of value in certain circumstances.

Section 10(e) requires the Commission to make valuations for several different kinds of benefits. For example, the Commission must fix charges to recompense the Government for any occupancy of its lands. In the absence of special circumstances, one might suspect a national average rental value to be an appropriate measure of the benefits conferred on the licensee through occupancy of the land, and the Commission has recognized this in its regulations.[57] However, Section 10(e) also calls upon the Commission to make more difficult valuations. For example, as in the instant case, it is required to place some value on a licensee's use of water from a dam. Here, the Commission is not seeking to measure the benefit derived from occupancy of a fungible tract of real estate; rather, it is required to measure the value of the licensee's "use" of the water from

[56] *See, Id.* at 6519-21; 6524.

[57] 18 C.F.R. 11.21(b).

a specific dam.[58] Moreover, it is not the value of the use for *any purpose* that the Commission must ascertain, but the value of use for a *particular purpose*, namely, generating electric-power.[59]

The central issue presented in this case by Vanceburg's claim really concerns the problem of valuation. It is this: what is the proper basis for dam-use charges under Section 10(e)—is it the *actual* value of dam use for power purposes *to each specific licensee*, public or private, as the Commission contends, or is it a more general standard such as the value of dam use for power purposes *to the average investor-owned utility in the region*, as Vanceburg contends?

The Commission's interpretation that Section 10(e) authorizes dam-use charges based on the actual value of dam use to the specific licensee is a reasonable one, and as such is entitled to great weight.[60] We find nothing in the Act which militates against this construction. Moreover, we believe that this interpretation is most consistent with the notion of compensation in that each licensee is to be charged in direct proportion to the fiscal benefit it actually receives. When Congress has failed to provide a formula for the Commission to follow, a court is not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation.[61] Therefore, we conclude that a proper basis for dam use charges under Section 10(e) is the actual value of dam use to the specific licensee.

The analogy of a lease in a shopping center might serve to illustrate the arguments and position of the parties here. Assume that two similar type stores lease space identical

[58] 16 U.S.C. § 803(e).

[59] *Cf., Montana Power Co.* v. *FPC*, 298 F.2d 335, 112 U. S. App. D. C. 7 (1962). *See also*, 18 C.F.R. 11.22.

[60] *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).

[61] *Cf., Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581, 589-91 (1944).

in size and desirability of location in the same shopping center, the two stores might pay the same or different rental depending on the terms of the leases. If ABC Stores and XYZ Shops each have a lease under which the rental is calculated at a percentage of gross sales, and ABC's dollar volume is twice that of XYZ's, then ABC will pay twice the rent of XYZ. This would be justified on the basis that the benefit conferred on ABC by occupancy of the space is twice the benefit conferred on XYZ. This is the Commission's argument here.

On the other hand, ABC might anticipate this situation developing, and argue during negotiation with the shopping center that its greater sales volume will be due to superior salesmanship, better products, a larger expenditure on advertising, a longer established reputation in that community, etc., and that a flat fee rental only should be charged. This is the argument of Vanceburg here, *i.e.*, its tax exempt municipality status enables it to achieve a much greater saving from hydro power instead of fossil fuel, compared to that achieved by an investor-owned taxpaying utility, hence it should pay only a flat fee comparable to that charged private utilities.

There is nothing inherently right or wrong, fair or unfair, with either method of calculating rentals. In the commercial example, the rental formula negotiated will be determined by the commercial negotiating strength of the parties. In our case here, the Commission has a discretion within the statute in fixing "reasonable annual charges", and thus conceivably might use any one of several methods in calculating the charge, actual value of dam use to the specific licensee being one of them.

Tax costs are *real* costs and tax savings are *real* savings, and we find nothing in Section 10(e) or in the other provisions of the Water Power Act which precludes the Commission from considering tax costs and tax savings in

ascertaining the real value of a dam-use license to a specific licensee. We do not believe that the Commission need close its eyes to tax consequences in order to effectuate the policies of the Water Power Act; nor do we believe that the Commission's consideration of tax consequences frustrates the policies of the Internal Revenue Code. In short, Vanceburg's exemption from federal income tax under Section 115(a) of the Internal Revenue Code does not exempt it from paying compensatory fees under Section 10(e) of the Federal Power Act.

Finally, we do not suggest that the Commission is free automatically to assess as charges the full amount of the value conferred on a licensee. Section 10(e) sets a maximum and a minimum charge, and directs the Commission to exercise its discretion and expert judgment in fixing a "reasonable" charge somewhere within this range. The maximum charge is the fully compensatory charge represented by the full value, or "net benefit," of the dam-use license. The second proviso of Section 10(e) sets the minimum charge: ". . . but in no case shall a license be issued free of charge" for use of a Government dam.[62] Within this range, the Commission must set a reasonable charge by considering all relevant factors and arriving at a charge which minimizes consumer costs, encourages power development, but at the same time, compensates the Government to some extent for the benefit it has conferred on the licensee. This appears to be precisely what the Commission has done in the instant case. The sharing-of-net-benefits formula, it seems strikes a balance which satisfies the statutory requirements that the general public be reasonably compensated by a licensee for its use of a particular Government dam, while at the same time minimizing consumer costs and encouraging power development by providing licensees with net benefits equal to the annual charge.

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[62] 16 U.S.C. § 803(e).

C. *Vanceburg's Contention Regarding the Discriminatory Impact of the Assessed Charges*

Vanceburg's third and final contention, raised inferentially in its supplemental applications for rehearing, is that the tax-exempt utility will always pay higher annual damuse charges than a similarly situated investor-owned utility under the sharing-of-net-benefits method unless a hypothetical tax liability is imputed to it.[63] Therefore, Vanceburg asserts, "[t]he charges thus assessed by the Commission that result in a prohibited discrimination against a class of licensees must, necessarily, be 'unreasonable' charges. . . ."[64] Such "discriminatory" charges, Vanceburg argues further, deter State and municipal participation in water-power development and, thereby, frustrate the policy of the Federal Power Act.[65]

Annual charges for the use of Government dams fixed under Section 10(e) of the Act are the product of the expert judgment of the Commission. The Commission has a range of discretion in fixing such charges so that it may balance all the relevant factors, including the impact of charges on consumer costs, the compensation of the Government, and the course of power development.[66] A licensee challenging the reasonableness of annual damuse charges carries the heavy burden of making a convincing showing that the charges are unreasonable or otherwise unauthorized.[67] Vanceburg has simply not met this burden with respect to its contention that the assessed charges are to have a discriminatory or deterrent impact. Vanceburg has not undertaken to explain precisely in what

[63]Vanceburg points specifically to the fact that the charges assessed against it are substantially higher than any previous charge assessed against a licensee: "No annual charge ever assessed by the Commission ever exceeded two and one-half times *less* than the charges levied against Vanceburg." Brief of Petitioner, 40.

[64]Brief of Petitioner, 43.

[65]*Id.* 43.

[66]See discussion in text at pages 33-34.

[67]*Cf., FPC* v. *Hope Gas Co.,* 320 U. S. 591 (1944).

way the charges at issue are discriminatory. This court is confronted only with an unsupported assertion that the charges are "necessarily" discriminatory. Without further elucidation by petitioner, we simply do not understand how this could be so. Merely because charges for municipal licensees are significantly higher than those assessed for similarly situated investor-owned licensees *does not necessarily* mean that municipalities are discriminated against. Charges which are proportionate to the actual value of the benefit conferred on a licensee are not discriminatory. If one class of licensees derives greater benefits from its licenses than another class of licensees, there is no discrimination when the first class is required to pay higher charges than the second. The net benefits formula measures the actual benefit conferred upon a licensee, whether public or private, and provides for an equitable sharing of the benefits by the licensee and the Government. *All licensees* receive net benefits after the Government fee equal to the annual charges, and Vanceburg is no exception. Its charges are higher than an investor-owned utility's would be, but it receives an equally greater benefit from its license.

Similarly, Vanceburg has not provided any support for its contention that the assessed charges deter municipalities from developing water power; nor do we see how this deterrent effect could exist. Under the sharing-of-net-benefits formula only one half of the cost savings resulting from the hydroelectric option would be assessed as charges. This means that there are still substantial cost advantages in pursuing that option, cost advantages equivalent to the charges themselves. Indeed, higher charges signify that the particular user finds greater advantages to hydroelectric development.

Finding, as we do, Vanceburg's challenges to the damuse charges assessed by the Commission to be either untimely or not well founded, we affirm the Commission's orders of 29 March and 21 June 1976.

II. STATUTES

A. Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), authorizes and empowers the Commmission—

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the

Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

B. Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a), provides:

(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

C. Section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), provides:

All licenses issued under this subchapter shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

D. Section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e), provides that licenses shall be on the following conditions:

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when

licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further,* That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

III. TABLE OF DAM-USE CHARGES

Project No.	Licensee	Installed Cap. (mW)	Annual Charge for Use of Gov't Dams ($)
13	Niagara Mohawk Power Corp...	7.2	5,000
289	Louisville Gas & Electric Co.....	76.8	95,000
362	Ford Motor Co.....	14.4	95,440
539	Kentucky Utilities Co.	2.04	4,400
1175	Kanawha Valley Power Co.	28.8	64,000[1]
1290	Kanawha Valley Power Co.	14.76	40,000
2056	Northern States Power Co.	20.4	3,300
2090	Green Mountain Power Corp....	5.52	Not determined
2165	Alabama Power Co.	45.54	74,000[2]
2203	Alabama Power Co.	40	Not determined
2211	Public Service Co. of Indiana...	81	45,950
2246	Yuba County Water Agency ...	295	Not determined
2280	Pennsylvania Electric Co. & Cleveland Electric Illuminating Co.	325	Not determined
2516	Potomac Edison	1.0	375[3]
2517	Potomac Edison	1.12	375[3]
2570	Ohio Power Co.	40	50,000
2736	Idaho Power Co.	92.4	Not[4] determined

[1]Charge Total for two developments—Marmet Development ($32,000) and London Development ($32,000).

[2]Initial charge was $89,600. Reduced to $74,000 after construction of Holt Project No. 2203.

[3]Negotiated agreement with U.S. Park Service prescribed total charge for Projects Nos. 2516 & 2517 at $750.

[4]List does not include Projects Nos. 2245 and 2614 (Cannelton and Greenup).

IV. CALCULATION OF DAM-USE CHARGES

The following explanation of the calculation of dam-use charges should be read in connection with the example in the Court of Appeals' opinion, App. at 32 n.26. *See also* J.A. 41 (calculations for Cannelton Project); J.A. 110 (calculations for Greenup Project).

1. Estimated Annual Cost of Hydroelectric Projects. The estimated capital cost of the Cannelton Project as of January, 1975, based on construction plans, is $33,914,000 (line 4). The estimated annual cost is determined as follows:

(a) fixed costs—these costs are determined by the Commission, *see* J.A. 114, and expressed as a percent of total capital costs:

(1) debt service	10.80%
(2) amortization	0.06%
(3) interim replacements	0.20%
(4) insurance	0.10%
(5) miscellaneous taxes excluding state and local taxes and federal income tax	0.10%
Total Fixed Charge Rate	11.26%

(b) O&M&A&G—these are variable costs for operations, maintenance, administration and general expenses.

(c) FPC Annual Charge—this is the Project's pro rata share of the costs of administering the Act, assessed under section 10(e).

2. Steam Electric Plant Alternative. A similar procedure is followed to estimate the annual cost of an alternative energy source, although here the estimate is based on cost per kilowatt rather than actual construction plans. The cost per kilowatt is then multipled times the "capacity" of the steam-electric plant alternative.

3. Variable Costs and Energy. Because a steam-electric plant must burn fuel rather than use surplus water power to generate electricity, a substantial variable cost, equal to 7.91 mills/kilowatt-hour, must be added to the estimated annual costs. The total annual cost of fuel is the amount of "energy" to be generated times the cost per unit. Thus, the difference between "capacity" and "energy" as components of the cost of a steam-electric plant, is that "capacity" represents the cost of building and maintaining the plant; "energy" is the cost of fuel to run the plant.

4. Net Benefits and Taxes. The effect of taxes is estimated at two percent of fixed costs. It might be thought that the gap between the cost of a steam-electric plant and the cost of a hydroelectric project would remain constant regardless of taxes. However, because fuel costs for a steam-electric plant are constant from a tax standpoint, and because fixed costs represent a much higher percentage of the total annual cost of a hydroelectric project (96.18%) than of a steam-electric plant (34.58%), the addition of a two percent income tax factor to the fixed charge rate increases the cost of a hydroelectric project proportionately much more than the cost of a steam-electric plant. The result is that the gap in total costs and the "net benefit" of a hydroelectric project are compressed.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. Howard Shapiro, Solicitor, Federal Energy Regulatory Commission, 825 North Capitol Street, Washington, D. C. 20326.

/s/ PHILIP P. ARDERY
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1332

CITY OF VANCEBURG, KENTUCKY - Petitioner

versus

FEDERAL ENERGY REGULATORY COMMISSION - - - - - Respondent

SUPPLEMENTAL APPENDIX
(Joint Appendix Pagination Included)

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

LICENSE (MAJOR)

Before Commissioners: RICHARD L. DUNHAM, *Chairman;* DON S. SMITH, JOHN H. HOLLOMAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY } Project No. 2245

ORDER ISSUING LICENSE (MAJOR)

(Issued March 29, 1976)

Harrison County Rural Electric Membership Corporation (HCREMC) of Corydon, Indiana, filed on September 7, 1961, and supplemented on December 12, 1969, and February 9 and October 14, 1970, an application under Section 4(e)[1] of the Federal Power Act (Act) for a major license to authorize the construction, operation and maintenance of the proposed Cannelton Project No. 2245, to be located at the U. S. Army Corps of Engineers (Corps) Cannelton Locks and Dam on the Ohio River. The Commission, by order issued September 8, 1971, authorized the substitution of the City of Vanceburg, Kentucky (Vanceburg or Applicant) as the applicant for the project. On November 1, 1972, January 8 and August 21, 1973, and June 6, 1974, Vanceburg supplemented the application.

Applicant proposes to construct a powerhouse, with an installed capacity of 70,560 kW, and appurtenant facilities in Hancock County, Kentucky, near Hawesville, Kentucky,

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[1] 16 U.S.C. §797(e).

and Cannelton, Ohio. The project will be located on the Ohio River at the Cannelton Locks and Dam, 720.7 river miles below Pittsburgh, Pennsylvania. The project will affect lands of the United States, will be located on a navigable waterway of the United States, and will utilize the surplus water or water power from a Government dam within the meaning of the Act.

The Cannelton Project No. 2245 will be constructed on the Kentucky side of the Ohio River, and will include a concrete powerhouse, to be constructed in an excavated channel, containing three submerged bulb-type Kaplan hydroelectric generating units with a total installed capacity of 70,560 kW;

[2]

a bridge connecting the powerhouse to an access road south of the project in Kentucky; an earthen dam with a top elevation of 388 feet mean sea level (m.s.l.) between the Corps' Cannelton Dam and the powerhouse; and other appurtenant facilities more fully described hereinafter.

Vanceburg will use the power generated at the project to meet its load requirements and will sell all power from the project, surplus to its needs, to East Kentucky Rural Electric Cooperative Corporation of Winchester, Kentucky (EKRECC), in accordance with a Memorandum of Agreement dated February 18, 1970, as amended February 1, 1972, and filed as part of Exhibit U on January 8, 1973. Vanceburg will construct two single-circuit transmission lines extending 2.8 miles southwest to deliver power to Big Rivers Rural Electric Cooperative Corporation's (Big Rivers) existing 161 kV Coleman-Hardinsburg transmission line. Big Rivers has negotiated an agreement with EKRECC to interconnect their systems through the transmission system of Kentucky Utilities Company. Pursuant to this agreement and the agreement between Vanceburg

and EKRECC, power from the project will be delivered to EKRECC and Vanceburg over the 138 kV transmission line to be built for the Greenup Project No. 2614. The marketing of power from the project and issues related thereto are more fully discussed hereinafter and in the Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Project No. 2614.

Notice of the application was originally issued on September 7, 1962, with October 22, 1962, as the last date for filing protests or petitions to intervene. No protests, notices of intervention, or petitions to intervene were filed in response to this notice.

In accordance with the Commission's order of September 8, 1971, *supra,* notice of the application was given on September 8, 1971, with November 15, 1971, as the last date for filing protests or petitions to intervene. On June 7, 1974, the Kentucky-Indiana Municipal Power Association (KIMPA) submitted an untimely petition to intervene. By order issued December 4, 1974, the Commission accepted the petition for filing and granted the intervention.

By letter dated June 8, 1970, the Corps recommended that studies in connection with the project be coordinated with the District Engineer, Louisville District, Corps of

[3]

Engineers (District Engineer). These studies, stated the Corps, should include the effect of the powerhouse location on a proposed future lock, modeling studies of the interrelationship of the hydroelectric plant axis and the dam axis in order to minimize the effects of hydroelectric plant discharges on navigation, the effects on navigation of the use of water above or below the normal navigation pool for peaking power purposes, the coordination of construction schedules, the need for communication and control facilities to ensure coordinated operation of power and navigation

facilities, and compatible architectural styles for power and navigation facilities. The Corps also stated that Applicant should provide for cutoffs under the powerhouse to prevent possible loss of the navigation pool, and that the height of the earthen dam between the powerhouse and the Corps dam should be limited to elevation 388 feet m.s.l. Corps and Commission approval of project structures is provided for in Articles 45 and 46 of the license.

The Corps recommended that Articles 5 through 9 inclusive of Standard Form L-6 be included in the license. *See Form L-6: Unconstructed Major Project Affecting Navigable Waters and Lands of the United States,* 34 F.P.C. 1114 (1965). Revised versions of these articles have been included in the license as Articles 12, 21, 22, 23, and 24 pursuant to the revision of this Form recently issued.

The Corps also recommended the inclusion of certain special articles in the license, if issued. The Corps stated that Applicant should reimburse the Government for the actual costs of any modifications of the navigation project required to accommodate Applicant's project. Article 49 provides for this reimbursement and specifies that the reimbursement is in addition to annual charges.

In order to minimize the effect of power operations on navigation, the Corps recommended that, upon notification by the Chief of Engineers, the Licensee be required to construct a deflecting wall, within one year, to deflect powerhouse discharges away from the locks. The design, location, time of construction, and maintenance of this pier or wall would be subject to Corps approval. By letter dated July 31, 1970, HCREMC stated that the need for a deflecting pier or wall could be determined after the result of modeling studies of the interrelationship of the hydroelectric plant axis and the

dam axis were known. Because we can conceive of situations where the installation of a deflecting wall or pier may be in the public interest, even assuming the optimum alignment of hydroelectric plant axis and dam axis, we have provided, in Article 48 of the license, for the installation of this structure, should it become necessary, for the protection of navigation.

The Corps further recommended that Applicant be required to convey to the United States, free of cost, lands, rights-of-way, and rights of passage, and to modify project structures in the event the United States desires to construct, complete or improve navigation facilities at Cannelton. In its July 31, 1970, letter, HCREMC requested that a provision be added to this proposed article to protect the rights of mortgagees, bond holders, or trustees for bond holders for the project, and that the words "for reasonable compensation" be substituted for the words "free of cost". In Article 22 of the license, we have incorporated that portion of the Corps' recommendation which is consistent with the provisions of the Act, particularly Section 11(b).[2]

The Corps also recommended an article releasing the Government from liability with respect to the construction, operation, and maintenance of both the project and the Cannelton Locks and Dam and providing for the payment by licensee of legal expenses related to suits against the United States. HCREMC, in its aforementioned letter, objected to the release of the Government from liability to Licensee's employees or agents arising out of the construction, operation, and maintenance by the United States of the Cannelton Locks and Dam. While we cannot agree with HCREMC and Vanceburg that the exemption from liability for the United States should be so circumscribed,

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[2] 16 U.S.C. §804(b).

we also cannot concur in the scope of the article proposed by the Corps. Accordingly, for the reasons set forth in our order issuing a license for the Racine Project No. 2570, we have provided for the release of the United States from liability, arising out of the construction, operation, and maintenance by the United States of the Cannelton Locks and Dam, only during the time Vanceburg's agents are engaged in the construction, operation, and maintenance of the power project. *Ohio Power Company*, Project No. 2570, 50 F.P.C. 2020 (1973).

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The Corps recommended that an operating agreement be entered into between the licensee and the District Engineer, that the licensee be required to waive claims against the United States based on present or future changes in navigation pools in the area, that construction schedules be subject to Corps approval, and that power plant operating schedules be provided to designated Corps personnel. Neither HCREMC nor Vanceburg objected to these conditions. We find that incorporation of these articles in the license is appropriate to protect the public interest in navigation. These conditions are set forth as Articles 45, 47, 50, and 51 of the license.

By letter filed February 18, 1974, Vanceburg concurred in HCREMC's comments on the Corps report. Vanceburg did state that the project would not be operated for peaking power purposes or for the purpose of utilizing pondage.

By letter filed July 30, 1970, the United States Department of the Interior (Interior) expressed concern about the effect of the project on water quality. Interior recommended that the project be operated on a continuous basis when river flows are less than 32,500 cfs and that provision be made for reaeration whenever dissolved oxygen content is less than 5 mg/1. Vanceburg has indicated that peaking

power operations through the use of additional reservoir storage will not be conducted and that Cannelton will operate using only available river flows. Articles 55 and 56 of the license provide for reaeration and monitoring of dissolved oxygen concentrations.

Interior noted that the Kentucky Statewide Comprehensive Outdoor Recreation Plan (SCORP) discussed the present and future need for many outdoor recreation activities in the vicinity of the project. Interior further recommended the filing of a revised Exhibit R. Recreational aspects of the project are discussed in greater detail hereinafter.

By letter dated May 18, 1970, the United States Department of Agriculture, Forest Service, indicated that the project would not affect National Forest programs and that license issuance would benefit the Rural Electrification Program.

The Kentucky Water Pollution Control Commission on September 6, 1972, certified that it has reasonable assurances that applicable water quality standards will not be violated by the project. On October 26, 1972, the Kentucky Water Pollution Control Commission deleted the one-year limitation on certification set forth in their September 6, 1972, letter.

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We have examined the environmental aspects of the project. During construction of the powerhouse the only clearing required would consist of removal of debris along the river bank. Material excavated for the powerhouse would be used to restore an area in the vicinity of the river bank which was eroded during construction of the Cannelton Dam and Locks and to build the earth dam between the Cannelton Dam and the powerhouse. The staging area used for construction of the Cannelton Locks and Dam can also be used for project construction activities.

The access road to the construction site may, however, have to be relocated. Furthermore, excavation for the powerhouse and related channels will result in some siltation in addition to that resulting from erosion caused by altered flow patterns of the Cannelton Locks and Dam. Articles 19 and 21 of the license require Vanceburg to take measures to prevent soil erosion and to excavate in such a manner as to preserve project environmental values and so as not to interfere with land or water traffic.

We have considered fish and wildlife values in the vicinity of the project. Commercial fishing on the Ohio River has been of economic importance in the past. While commercial fishing has declined in recent years, due partly to pollution and decreased profitability, commercial fishing has an important economic potential. Freshwater mussels add value to the commercial fisheries of the Ohio River. No anadromous fish utilize the Ohio River.

With respect to wildlife, white-tailed deer is the only big game animal in the vicinity of the Cannelton Project. Cottontail rabbit, gray squirrel, and fox squirrel are the most prevalent small game mammals in the project area. Waterfowl occur in the area, but this reach of the Ohio is outside principal waterfowl routes and flyways. No rare or endangered species of fish or wildlife would be affected by the project.

We have considered the fish and wildlife aspects of license issuance under the assumption that commercial and sport fishing will increase with improving water quality and advances in fisheries management techniques. The absence of anadromous fish from the Ohio River limits the need for fish passage facilities. Two variables which affect survival rates of fish passing through turbines are the amount of head and the setting of the turbine blade. The low head at the project and the fact that the turbine runner

blades can be adjusted are factors which are beneficial to fish survival rates. We are requiring the filing of a revised Exhibit S, based on the results of post-operational studies carried out in cooperation with interested

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Federal and State agencies, to determine the effect of project operation on the fisheries resources and to measure the effectiveness of the reaeration facilities in maintaining desired dissolved oxygen concentrations. Should additional fish protective measures be warranted, we have reserved sufficient authority under the license to require these measures.

Clearance of the transmission line right-of-way will generate the greatest potential impacts on wildlife. While Vanceburg has not selected a route for the 2.8 miles of transmission line, Vanceburg has indicated that Christmas trees would be planted in portions of the right-of-way and that shrubs with wildlife value will be planted on steep slopes and in areas of thin soil in order to prevent erosion. Selective clearing or clear-cutting, in lieu of shear clearing, should be used, where feasible, to minimize disturbance to the top soil and the need for revegetation. Any exposed soil surfaces should be stabilized and revegetated as soon as possible. Where the right-of-way is cleared through forested area, it is recommended that vegetation be managed by applying herbicides to the base of individual trees. This method prevents trees from interfering with power lines while maximizing the opportunity for shrubs and vines to occupy the right-of-way. If these practices are followed, construction, operation, and maintenance of the transmission line right-of-way will not measurably affect timber resources, the area's watershed, or the carrying capacity of the area for wildlife. Consistent with our concern for the potential environmental impacts of the project

works and the related transmission lines, we are requiring Vanceburg to file with the Commission its plan to avoid or minimize any disturbance to the natural, scenic, historic, and recreation values of the area.

The original Exhibit R filed by HCRECC did not comply with Commission regulations. No revised Exhibit R has been filed by Vanceburg. In its environmental report on the proposed action, however, Vanceburg discussed its proposed plans for a recreation area adjacent to the dam, consisting of parking for about 75 cars, picnic and sanitary facilities, and playing fields to be developed on a spoil area. An observation platform, connected by stairs to a fishing platform at normal river level, is planned by Vanceburg. A pedestrian walkway and roadway bridge would provide access between the platforms and the parking area.

We have heretofore discussed the need for recreational facilities and agency recommendations related thereto. Consistent with these recommendations, we have incorporated Article 54 in the

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license which requires Vanceburg to file a revised Exhibit R providing for facilities for optimal recreational development. Such facilities shall include, but shall not be limited to, those facilities proposed by Vanceburg in the environmental report (Exhibit W).

While fishing in the vicinity of the project is common, and pleasure boating and water skiing also occur, no developed recreational facilities exist on the Kentucky side of the Corps Dam. The project will not interfere with any existing recreational facilities. Furthermore, development of recreational facilities pursuant to an approved Exhibit R can only improve recreational opportunities in an area where such opportunities are currently limited, but the need for such opportunities is great.

The National Register of Historic Places, established under the provisions of the National Historic Preservation Act of 1966,[3] has been consulted. No listed properties, eligible properties, or State inventory properties are located in the vicinity of the project. Should any historic properties be located, however, we have provided for this contingency in Article 41 of the license.

While no historic properties are located in the vicinity of the project, we note that no archeological survey has been conducted. Article 40 requires Licensee, prior to commencement of construction, to determine the necessity for archeological survey and salvage excavations and to provide funds in a reasonable amount for such survey and salvage excavations.

We have considered alternatives to the project. The alternative of denial of the application was considered. Even assuming that Vanceburg is unsuccessful in attracting industry to utilize the power and, thus, cannot utilize all the power itself, the electric power demands of the combined EKRECC-Vanceburg system will require development of an equivalent amount of power. Furthermore, while electric energy conservation practices may initially reduce the need for this capacity by lessening the growth in energy demand, we believe the public interest would best be served by issuing a license and allowing the development of water resources which otherwise would not be utilized, especially where, as here, the dam is in existence

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and environmental impacts are not significant. Indeed, because the project is located at an existing Government dam, designed to accommodate hydroelectric generating equipment, no other conventional hydroelectric site is considered a reasonable alternative. Because the project will

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[3] 16 U.S.C. §470.

be operated as a run-of-the-river facility at a plant factor of approximately 55 percent, pumped storage hydroelectric projects and gas turbine facilities, which serve peaking functions, are not considered reasonable alternatives.

Of those alternatives which have a comparable plant factor, fossil fueled steam electric generating units are considered the most viable alternatives. Our studies indicate that a fossil fueled unit sized to meet the needs of a combined EKRECC-Vanceburg system would not provide power as economically as the power to be produced at Cannelton. Furthermore, such a fossil fueled unit would utilize a non-renewable resource with attendant air quality problems.

The issuance of this license for the construction and operation of Project No. 2245 will provide for the use of a renewable resource to produce an average of 340,000,000 kilowatt-hours of electric energy annually. This will conserve fuel resources equivalent to 540,000 barrels of oil annually.

There are no conflicting applications for preliminary permit or license before the Commission. While Southern Indiana Gas & Electric Company (SIGE) filed an application for a preliminary permit for the Cannelton site on March 26, 1959, a preliminary permit issued to HCRECC on October 28, 1958, was then in effect. Accordingly, the Secretary rejected the SIGE filing by letter dated April 1, 1959. *See* 18 C.F.R. §4.30 (1975).

We have examined the economic and financial feasibility of the project. With respect to financial feasibility, Applicant has demonstrated that it can obtain the necessary financing to construct the project through the issuance of revenue bonds.

Based on our studies, a fossil fueled steam-electric generating facility, which is the least expensive alternative

energy source, could provide capacity and energy equivalent to that estimated to be generated at the project, at an annual cost of $4,457,700. The annual cost of producing power from the project is estimated to be $3,970,300. In light of the facts that the estimated cost of producing power from the project is less than the estimated cost of producing an equivalent amount of power from a suitable alternative and that an adequate market for the power has been demonstrated, we conclude that the project is feasible from an economic standpoint.

Section 10(e) of the Act, 16 U.S.C. §803(e), requires the Commission to fix a reasonable annual charge to be paid to the United States for the use of a Government dam. The matter of such an annual charge is discussed at greater length in the Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Project No. 2614, where we follow long-standing, consistent Commission practice by adopting the "sharing of the net benefits" approach to the assessment of the charge. Based upon this approach and an analysis by our staff of the net benefits

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to be derived from the Cannelton Project, we find that the annual charge to be paid by Vanceburg for its use of the Government dam should be $243,700. For the reasons set forth in the above mentioned order issuing a license for the Greenup Project, we will assess one-third of the total annual charge with the effective date of commercial operation of each of the three generating units at the Cannelton Project. These annual charges are provided for in Article 57 of this license.

We have heretofore discussed the environmental effects of construction, operation, and maintenance of the two 2.8-mile-long single-circuit 161 kV transmission lines, and

have conditioned the license accordingly. The Big Rivers' Coleman-Hardinsburg line will be looped via these 2.8-mile lines through the 161 kV bus at Cannelton. Based on available information, we cannot determine whether the Coleman-Cannelton, Cannelton-Hardinsburg 161 kV line and the Cannelton 161 kV bus should be included in the license without the benefit of actual data on power flows over these lines. Therefore, we have reserved the right to determine what additional transmission facilities, if any, should be included within the license for the Cannelton Project No. 2245.

We now turn to the allegations advanced by KIMPA. In the Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Project No. 2614, we discuss these allegations in detail. However, one of KIMPA's alternatives to the use of power from the Cannelton and Greenup projects is particularly germane to our consideration of this application. Therefore, we discuss that marketing plan here.

In the early part of 1974, KIMPA suggested that Vanceburg and EKRECC modify their Memorandum of Understanding to allow KIMPA to be substituted as the applicant for license for the Cannelton Project No. 2245. On May 17, 1974, Vanceburg stated that no action would be taken on this proposal until EKRECC agreed to the proposal. EKRECC has taken no action on the proposal.

If KIMPA was genuinely interested in obtaining a license for this project, it could have filed an application for license. No authorization from Vanceburg or EKRECC was necessary for this action. Indeed, because Vanceburg never held a preliminary permit for this project, Vanceburg has no priority under Section 5[4] of the Act. Furthermore, because both Vanceburg and KIMPA are municipal-

[4]16 U.S.C. §798.

ities within the meaning of the Act, neither would be entitled to a preference under Section 7(a)[5] of the Act. Thus, competing applications by KIMPA and Vanceburg would be evaluated under the comprehensive development standard of Section 10(a)[6] of the Act. In that

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situation a determination whether KIMPA's application or Vanceburg's application would best satisfy the statutory standard would certainly be in the public interest.

KIMPA had a remedy under the Act for Vanceburg's and EKRECC's failure to accede to KIMPA's request: the filing of a competing application for license. The fact that KIMPA has not availed itself of this remedy, a remedy which is clearly within our authority, provides additional justification for our disposition of the marketing aspects of this proceeding.

We have heretofore discussed the expected environmental impacts of construction, operation, and maintenance of the project. Based on these impacts, we conclude that issuance of a license subject to the terms and conditions hereinafter imposed would not be a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C)[7] of the National Environmental Policy Act of 1969.

The Commission finds:

(1) The Cannelton Project No. 2245 would affect lands of the United States, would be located on a navigable waterway of the United States, and would utilize the surplus water or water power from a Government dam.

(2) Applicant is a corporation organized under the laws of the State of Kentucky and has submitted satisfactory

[5]16 U.S.C. §800(a).
[6]16 U.S.C. §803(a).
[7]42 U.S.C. §4332(2)(C).

evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project.

(3) Public notice of the filing of the application was given on September 7, 1962, and September 8, 1971. A late petition to intervene, filed by the Kentucky-Indiana Municipal Power Association on June 7, 1974, was granted by Commission order issued December 4, 1974.

(4) For the reasons set forth in this order and in our Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Project No. 2614, the allegations raised by Kentucky-Indiana

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Municipal Power Association present no disputed facts or facts which have not been accepted as true for the purposes of decision. Therefore, an evidentiary hearing is neither warranted nor in the public interest.

(5) No conflicting application is before the Commission.

(6) Subject to the terms and conditions hereinafter imposed, the project does not adversely affect a Government dam, nor will the issuance of a license therefor, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States.

(7) Subject to the terms and conditions hereinafter imposed, the project will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes.

(8) Applicant has submitted satisfactory evidence of its financial ability to construct, operate, and maintain the proposed project.

(9) The estimated cost of developing the project compared to the estimated cost of developing suitable alternative sources of power is reasonable.

(10) The installed horsepower capacity of the project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is 94,100 horsepower, and the amount of annual charges based on such capacity to be paid under the license for the project for the cost of administration of Part I of the Act is reasonable.

(11) For the purpose of recompensing the United States for the use of the Government's Cannelton Locks and Dam and appurtenant structures, the annual charge for such use is hereinafter authorized to be $243,700 which charge is reasonable, is based upon the "sharing of the net benefits" method; and may be readjusted in the future pursuant to Section 10(e) of the Act.

(12) It is desirable to reserve for a later date a determination as to the amount of annual charges for the use, occupancy and enjoyment of lands of the United States.

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(13) Subject to the terms and conditions hereinafter imposed, the plans of the structures affecting navigation have been approved by the Corps of Engineers.

(14) The term of the license hereinafter authorized is 50 years, which term is reasonable.

(15) The exhibits designated and described in Paragraph (B) below conform to the Commission's Rules and Regulations and should be approved as part of the license for the project to the extent indicated herein.

The Commission orders:

(A) This license is hereby issued to the City of Vanceburg, Kentucky (hereinafter Licensee), under Section 4(e)

of the Federal Power Act for a period of 50 years effective the first day of the month in which this license is issued for the construction, operation and maintenance of the Cannelton Hydroelectric Project No. 2245, located on the Ohio River and affecting navigable waters of the United States, and utilizing surplus water or water power from, and affecting, the Cannelton Locks and Dam of the United States and appurtenant lands acquired by the Corps of Engineers, subject to the terms and conditions of the Act, which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) The Cannelton Project consists of:

(i) all lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interests in such lands necessary or appropriate for the purposes of the project, whether such lands or interests therein are owned or held by the applicant or by the United States; such project area and project boundary being more generally shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

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Exhibit	FPC Number	Title
J-1	2245-25	General Map and Profile of River
J-2	2245-26	General Plan and Vicinity Map
J-3	2245-27	Project Plan
J-4	2245-28	Transmission System
K	2245-29	Land Ownership Map

approved only to the extent that they show the general location of the project

(ii) project works to be constructed on the Kentucky side of the Ohio River in an excavated channel including: (1) a forebay channel and a tailrace channel; (2) a concrete powerhouse containing 3 submerged bulb-type hydroelectric generating units with a total installed capacity of 70,560 kW; (3) a bridge connecting the powerhouse to an access road south of the project; (4) an earthen dam with a top elevation of 388 feet between the U. S. Cannelton Dam and the powerhouse; (5) the generator leads; (6) the 4.8/161 kV step-up transformer; and (7) appurtenant facilities which connect to the 161 kV bus (excluding the 161 kV bus) and other appurtenant facilities—the location, nature and character of which are most specifically shown and described by the exhibits hereinbefore cited and by certain other exhibits which also form part of the application for license and which are designated and described as follows:

Exhibit	FPC Number	Showing
L-1	2245-30	Powerhouse Plan
L-2	2245-31	Section through Powerhouse
L-3	2245-32	Transverse Section

Exhibit M: Consisting of two typewritten pages, filed December 12, 1969, entitled "Mechanical and Electric Equipment."

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(iii) all of the structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project and located within the project area, and such other property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Com-

mission; together with all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(C) This license is also subject to the terms and conditions set forth in Form L-6 (revised October, 1975) entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States," which terms and conditions, designated as Articles 1 through 37, are attached hereto and made a part hereof, except for Articles 7 and 20, which are hereby deleted for the purposes of this license, and subject to the following special conditions set forth herein as additional articles:

Article 38. The Licensee shall dispose of all temporary structures, unused timber, brush, refuse, or other unneeded material resulting from the clearing of lands or from the maintenance of the project works and associated transmission facilities. Disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 39. The Licensee shall, during the construction and operation of the project, continue to consult and cooperate with the Fish and Wildlife Service of the U. S. Department of the Interior and other appropriate Federal, State, and local agencies for the protection and development of the natural resources and values of the project area.

Article 40. The Licensee shall, prior to commencement of construction, consult and cooperate with appropriate Federal, State, and local agencies to determine the extent of archeological survey

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and salvage excavations, if any, that may be necessary prior to any construction activities, and shall provide funds in a reasonable amount for any needed survey or salvage excavations to be conducted.

Article 41. The Licensee shall cooperate with appropriate State and local agencies in the identification of historical structures, if any, within the project area, and if necessary, shall cooperate in developing a plan for the protection or relocation of such structures.

Article 42. The Licensee shall, to the satisfaction of the Commission's authorized representative, install and operate such signs, lights, sirens, or other devices below the powerhouse to warn the public of fluctuations in flow from the project, and shall install such signs, lights and other safety devices above the powerhouse intakes, as may be reasonably needed to protect the public in its recreational use of project lands and waters.

Article 43. The Licensee shall release and save and hold the Government harmless from any and all causes of action, suits-at-law or equity, or claims or demands, or from any liability of any nature whatsoever, for and on account of any property damage (including damages thereto or taking of real estate or interests therein by reason of the flooding and/or erosion of such property by impoundments and/or discharges for purposes other than operation and maintenance of the Cannelton Locks and Dam project for navigation purposes), personal injury, or death arising out of the construction, operation, and maintenance of the power project; and the Licensee shall release and save and hold the Government harmless from any and all causes of ac-

tion, suits-at-law or in equity, or claims or demands, or from any liability of any nature whatsoever for and on account of any property damage, personal injury, or death of any of the Licensee's employees, contractors, licensees, agents, permittees, or assignees during the time they are engaged in the construction, operation, and maintenance of the power project, and arising out of the construction, operation, and maintenance by the

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United States of the Cannelton Locks and Dam project. In partial support of its obligations under this clause, the Licensee shall defend or, at the option of the Government, shall reimburse the Government for all costs of defending, all claims and suits-at-law or in equity instituted against the United States for any damage caused or alleged to have been caused by operation of the power project, or the operation of the Cannelton Locks and Dam project in aid of the power project, including payment to landowners for any inverse or physical taking of real estate or interest therein adjudged by any court of competent jurisdiction by verdict, decision, or agreement of parties, to have resulted from the operation of the power project or the operation of the Cannelton Locks and Dam project in aid of such power project (including litigation in which the United States is not a defendant); and, on request of the United States, shall properly record in the land records of the appropriate county and State all such judgments of said courts, and shall procure and record any other evidence of such taking, and payment therefor, reasonably required by the United States, running to the Licensee or to the United States, as determined appropriate by the United States, including takings adjudged as aforesaid by

courts of competent jurisdiction and agreements made between the Licensee and landowners in compromise or avoidance of litigation.

Article 44. The Licensee shall commence construction of the project within two years from the effective date of the license, shall thereafter in good faith and with due diligence prosecute such construction, and shall complete construction of such project works within five years from the effective date of the license.

Article 45. The design and construction of all facilities that will be an integral part of the dam or that could affect the integrity of the navigation system, including construction procedure and sequence, shall be subject to the review and approval of the District Engineer, Corps of Engineers, Louisville, Kentucky.

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Article 46. The Licensee shall, after obtaining written approval from the Chief of Engineers of the plans of any project structures affecting navigation, submit, in accordance with the Commission's Rules and Regulations, revised Exhibit L drawings and an Exhibit M showing final designs of the project works, and a revised Exhibit J-3 showing, *inter alia*, the location and orientation of the project works with respect to the Government dam. The Licensee shall not begin construction of any such project structures until the Commission has approved such exhibits.

Article 47. The Licensee shall, prior to initiation of power operations, enter into an agreement with the District Engineer, Corps of Engineers, Louisville, Kentucky, specifying details of an operating plan to protect Federal interests, including limitations of fluctuations in the Cannelton Reservoir and the reservoir im-

mediately downstream. This agreement shall be subject to review upon the request of either party on the basis of operating experience.

Article 48. In the event the Chief of Engineers shall deem it necessary for the protection of navigation, and shall so notify the Commission, the Commission, after notice and opportunity for hearing, may require the Licensee at no expense to the Federal Government, and within one year from said date of notification, to construct a deflecting pier or wall in the river below the dam to deflect the current caused by discharge from the power plant away from the entrance to the locks. The Licensee shall maintain such facilities at his expense. The design, location, and time of construction of such deflecting pier or wall shall be subject to the approval of the Chief of Engineers.

Article 49. The Licensee shall reimburse the Government for all costs, including design and construction costs incurred by the Government for the specific and sole purpose of accommodating the Licensee's project. These costs will be in addition to the annual payments specified in paragraph (ii) of Article 57. Arrangements for payment shall be made with the Chief of Engineers, U. S. Department of the Army, at the time of commencement of construction of the project.

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Article 50. The Licensee shall furnish designated Corps of Engineers operating personnel with proposed operating schedules of the power plant, including information on operation of air vents, if pertinent, in advance of power plant operation and revisions thereof on reasonable notice.

Article 51. The Licensee shall have no claim against the United States arising from the effect of any changes made or not made in the pool levels at Cannelton Locks and Dam or the downstream locks and dam for navigation or other beneficial purposes.

Article 52. The Licensee shall avoid or minimize any disturbance caused by construction, operation, and maintenance of the project works and related transmission lines to the natural, scenic, historic and recreational values of the area, blending project works and related transmission lines with the natural view, and revegetating, stabilizing, and landscaping all construction areas. Within one year from the date of issuance of this license, the Licensee shall file with the Commission its detailed plan to avoid or minimize any disturbance to such values caused by construction, operation, and maintenance of the project works and related transmission lines. The plan, including an architectural rendering of the major project features, shall be prepared after consultation with a professional land use planner and appropriate Federal, State, and local agencies, and shall give due consideration to the provisions of the Commission's Order No. 414, issued November 27, 1970. The Commission reserves the right, after notice and opportunity for hearing, to prescribe any changes in the plans that the public interest may warrant.

Article 53. Within one year after commencement of construction of the project and after consultation with the Corps of Engineers concerning the location of the proposed project boundary, the Licensee shall file a revised Exhibit F and for Commission approval, revised Exhibits J and K delineating the proposed project boundary and the amount of United States

lands within said boundary. The Licensee shall acquire title in fee to all lands, other than lands of the United States and lands for transmission line rights-of-way, within the project boundary shown on the Exhibits J and K approved by the Commission pursuant to this article.

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Article 54. The Licensee shall file, for Commission approval, within one year from the date of issuance of this license, a revised Exhibit R in conformance with Section 4.41 of the Regulations under the Federal Power Act. The Exhibit shall be prepared in consultation and cooperation with appropriate Federal, State, and local agencies, and after a study with those agencies to determine the recreational facilities needed to provide for optimum public utilization of the project area. The revised Exhibit shall include, but shall not be limited to, site development plans, cost estimates, and development schedules for the sanitary, picnic and parking facilities; the public fishing facilities in the tailrace area; and the overlook area on the Kentucky side of the dam, as proposed on pages 81 and 82 and shown on Figures II-3, II-4, and II-5 of Appendix II of the Exhibit W, filed as part of the application for license for Project No. 2245.

Article 55. The Licensee, following consultation with appropriate water quality agencies, shall install a continuously recording dissolved oxygen monitoring system positioned to sample water discharged from the project during generation, and shall maintain records of the data obtained from the monitoring system and make them available to appropriate agencies upon request. The Licensee shall install facilities for the admission of air into the draft tubes and shall during power

generation periods, operate such facilities whenever the dissolved oxygen concentration in the project discharge declines below 5.0 mg/1.

Article 56. The Licensee shall conduct studies, in cooperation with appropriate Federal, State, and local agencies, to determine any effects the project will have on fishery resources and, within three years from the date of commencement of operation of the project, shall file for Commission approval a revised Exhibit S prepared in accordance with Section 4.41 of the Commission's Regulations which shall include, *inter alia,* the conclusions of said studies and a summary of the operation of the air admission and dissolved oxygen monitoring systems in maintaining desired dissolved oxygen levels in the project discharge as required in Article 55 of this license.

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Article 57. The Licensee shall pay to the United States the following annual charges:

(i) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable annual charge as determined by the Commission, in accordance with its regulations in effect from time to time, the authorized installed capacity for such purpose being 94,100 horsepower;

(ii) For the purpose of recompensing the United States for the utilization of the Government's Cannelton Locks and Dam and appurtenant structures, $243,700 which charge may be readjusted in the future pursuant to the provisions of Section 10(e) of the Act, and which shall be assessed as follows: (a) $81,234 effective as of the date of commercial operation of the first generating unit; (b) $162,467

effective as of the date of commercial operation of the second generating unit; and (c) $243,700 effective as of the date of commercial operation of the third generating unit;

(iii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, an amount to be hereafter determined by the Commission.

(D) The Commission reserves the right to determine at a future date what additional transmission facilities, if any, shall be included within the license for this project.

(E) The Exhibits designated and described in Paragraph (B) above are hereby approved to the extent indicated therein and made a part of the license.

(F) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

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APPENDIX A

Computation of Net Power Benefits, Cannelton Project No. 2245

1. Cannelton Hydroelectric Project No. 2245

Installed Capacity 70.56 MW	
Est. Average Annual Generation 340 GWh	
Est. Dependable Capacity 32.5 MW	
Estimated Capital Cost, 1/75 $33,914,000	
Est. Power Supplied to U.S. Government	
Energy — 0.648 GWh	
Capacity — 0.394 MW	
Estimated Annual Cost	
Fixed (33,914) (.1126)	$3,818,700
O & M & A & G	146,000
FPC Annual Charge	5,600
Total	$3,970,300

2. Steam Electric Plant Alternative

(2,500 MW Units w. Cooling Towers)	
Estimated Capital Cost (1/75)	$/kW
Steam Plant	363.74
Transmission	49.70
Total	413.44
Estimated Annual Cost	
Fixed ($413.44) x 0.1181	48.83
O & M A & G	2.63
Fuel, fixed & inventory	4.72
Total	56.18
Estimated Variable Cost	7.91 mills/kWh

3. Estimated Annual Value

Capacity[1] (31,960-394) kW x $56.18/kW	= $1,773,400
Energy (340,000-648) MWh x $7.91/MWh	= $2,684,300
Total	$4,457,700

4. Estimated Net Power Benefit

$4,457,700 — $3,970,300 = $487,400

[1] $\frac{\text{Hydro adjustment}}{\text{dependable capacity}} \times \frac{\text{probability of meeting load-hydro}}{\text{probability of meeting load-steam}}$

$$32{,}500 \times \frac{0.87771}{0.89257} = 31{,}960$$

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Form L-6
(Revised October, 1975)

FEDERAL POWER COMMISSION

TERMS AND CONDITIONS OF LICENCE FOR UNCONSTRUCTED MAJOR PROJECT AFFECTING NAVIGABLE WATERS AND LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall became a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

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Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 4. The construction, operation, and maintenance of the project and any work incidental to additions or alterations shall be subject to the inspection and supervision

of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of the project and for any subsequent alterations to the project. Construction of the project works or any feature or alteration thereof shall not be initiated until the program of inspection for the project works or any such feature thereof has been approved by said representative. The Licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

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Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construc-

tion, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is transferred to a new licensee or to a non-power licensee under the provisions of Section 15 of said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or

project property created by the Licensee or created or incurred after the issuance of the license: *Provided,* That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

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Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Article 8. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the

supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribed.

Article 9. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

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Article 10. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power system and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 11. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such deter-

mination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

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Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in

the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 14. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be im-

posed by any other lawful authority for avoiding or eliminating inductive interference.

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Article 15. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance,

and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

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Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided,* That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The Licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir

area. Further, the Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Material may be dredged or excavated from, or placed as fill in, project lands and/or waters only in the prosecution of work specifically authorized under the license; in the maintenance of the project; or after obtaining Commission approval, as appropriate. Any such material shall be removed and/or deposited in such manner as to reasonably preserve the environmental values of the

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project and so as not to interfere with traffic on land or water. Dredging and filling in a navigable water of the United States shall also be done to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 22. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and rights-of-way and such rights of passage through its dams or other structures, and shall permit such control of its pools, as may

be required to complete and maintain such navigation facilities.

Article 23. The operation of any navigation facilities which may be constructed as a part of, or in connection with, any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army.

Article 24. The Licensee shall furnish power free of cost to the United States for the operation and maintenance of navigation facilities in the vicinity of the project at the voltage and frequency required by such facilities and at a point adjacent thereto, whether said facilities are constructed by the Licensee or by the United States.

Article 25. The Licensee shall construct, maintain, and operate at its own expense such lights and other signals for the protection of navigation as may be directed by the Secretary of the Department in which the Coast Guard is operating.

Article 26. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided,* That timber

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so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 27. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 28. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 29. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands,

or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

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Article 30. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 31. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 32. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or

maintained under the license, and any radio installation, t[illegible]phone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 33. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the trans-

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mission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 34. The Licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. sec. 601, *et seq.*), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof: *Provided,* That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the Licensee for the purposes of the license: *Provided further,* That in the event of disagreement, any question of unreasonable inter-

ference shall be determined by the Commission after notice and opportunity for hearing.

Article 35. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

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Article 36. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and

regulations, or an annual license under the terms and conditions of this license.

Article 37. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

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In Testimony of its acknowledgment of acceptance of all of the provisions, terms and conditions of this license, City of Vanceburg, Kentucky, this ____ day of _____, 19____, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to a resolution of its Board of Directors duly adopted on the ____ day of _____, 19 ___, a certified copy of the record of which is attached hereto.

By_____
President

Attest:

_____
Secretary

(Executed in quadruplicate)

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

City of Vanceburg, Kentucky } Project No. 2245

PETITION FOR REHEARING OF THE CITY OF VANCEBURG, KENTUCKY

The City of Vanceburg, pursuant to § 313(a) and (c) of the Federal Power Act, and § 1.34 of the Commission's Rules of Practice and Procedure, hereby petitions rehearing in the above captioned matter and moves the Commission to make final its order issuing a license to Vanceburg, said order being dated March 29, 1976. Vanceburg further states as follows:

1. Said order in Article 57 (p. 21) requires Petitioner to pay to the United States certain annual charges. Petitioner states that said charges are not proper for the reason that Vanceburg is a municipal corporation of the Commonwealth of Kentucky and the Vanceburg Electric Light Heat and Power System is a corporate entity totally owned by the city pursuant to § 96.520 of the Kentucky Revised Statutes. As such it is a public non-profit body.

2. Vanceburg has an agreement with East Kentucky Power Cooperative (East Kentucky) for certain transmission service and firming up of power and sale of excess power out of said project to East Kentucky. East Kentucky is a generation and transmission cooperative all of whose eighteen members are distribution electric cooperatives in the Commonwealth of Kentucky, organized under Chapter 279 of the Kentucky Revised Statutes. East Ken-

tucky and all of its members are non-profit cooperatives and are exempt from Federal income tax under § 501(c)(12) of the Internal Revenue Code of 1954 as amended.

3. Appendix A of the order is further in error because it does not include consideration of the amount of power Vanceburg Electric Light Heat and Power System provides at no cost to the

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municipality of Vanceburg.

WHEREFORE Vanceburg prays:

1. The Commission grant rehearing in the matter herein for the reasons above stated, and
2. Moves the Commission to make final its order granting license herein to Vanceburg.

Respectfully submitted,

(s) Philip P. Ardery
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202

(s) Marlow W. Cook
Shook, Hardy & Bacon
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for City of Vanceburg

April 27, 1976

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

CITY OF VANCEBURG, KENTUCKY } Project No. 2245

MOTION OF THE CITY OF VANCEBURG, KENTUCKY TO SUPPLEMENT ITS PETITION FOR REHEARING

The City of Vanceburg, Kentucky (Vanceburg) hereby moves the Commission to consider the following items as a supplement to its Petition for Rehearing, heretofore filed, and further states:

1. Vanceburg, pursuant to § 313(a) and (c) of the Federal Power Act, and § 1.34 of the Commission's Rules of Practice and Procedure, filed on April 27, 1976 a timely Petition for Rehearing in the above captioned matter.

2. The Commission's Order Issuing License (Major) in this matter was issued on March 29, 1976. Vanceburg's consulting engineers, W. M. Lewis & Associates, Inc., of Portsmouth, Ohio, and Sogreah of Grenoble, France, made every effort to thoroughly review the technical details of the Order prior to the deadline for filing for rehearing but, due to principals of Lewis & Associates being involved in several matters before various state regulatory commissions and the inherent delay in exchange of correspondence with Grenoble, France, the engineers were unable to make a complete analysis of the Order prior to the filing for Rehearing on April 27.

3. After analysis of the Commission's Order by Vanceburg's consulting engineers, it appears appropriate and pertinent to the Commission's consideration that additional

facts regarding Article 57 of the Order (page 21)—and particularly Appendix A which was attached to and made part of the Order—be presented.

4. Vanceburg is a municipal corporation of the Commonwealth of Kentucky and the Vanceburg Electric Light, Heat and Power System is a corporate entity totally owned by the City pursuant to § 96.520 of the Kentucky Revised Statutes. As such, neither Vanceburg nor Vanceburg Electric Light, Heat and Power System pays Federal or state income tax as does an investor-owned electric utility.

5. The construction of Appendix A properly did not consider income taxes. If it had, as would have been required if Applicant was an investor-owned utility, the factor of 0.1126 in item 1 of Appendix A may well have been 0.1326, assuming an amount of 2 percent for the effect of income taxes. Assuming this same premise, the factor of 0.1181 in item 2 of Appendix A would have been 0.1381. Using these factors, the estimated net power benefits in item 4 of Appendix A would have been

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$70,100 instead of $487,400. To illustrate this, a sample calculation is attached hereto. Thus, the annual charge in Article 57(ii) for the purpose of recompensing the United States for the utilization of the Government's Cannelton Locks and Dam and appurtenant structures would be $35,050.

6. Without giving consideration to the above, Vanceburg loses its advantage of being a municipality and owning and operating a municipal electric system for the benefit of its citizens.

7. Vanceburg filed as part of its Application for License an Economic Study wherein computations similar to those in Appendix A were provided. In this Study, Vanceburg delineated the individual items making up the annual

costs which the Commission in Appendix A to its Order establishes as 11.26 percent for hydro and 11.81 percent for steam. Since these are different than the factors used by Vanceburg, it will be extremely helpful to Vanceburg's consulting engineers to know the breakdown of these percentages and therefore requests the Commission to make them available.

WHEREFORE, Vanceburg prays that the Commission sustain this Motion to add the foregoing facts as a supplement to Vanceburg's Petition for Rehearing and further prays that:

1. The Commission recalculate Appendix A of its Order, giving Vanceburg full advantage of its municipality status.

2. Article 57(ii) of Part (C) of the Commission's Order be modified to reflect the recalculated Estimated Net Power Benefits of Appendix A.

3. The calculations used by the Commission in Appendix A be made available to Vanceburg.

Respectfully submitted,

(s) Philip P. Ardery
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202

(s) Marlow W. Cook
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1776 K Street, N.W.
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Counsel for City of Vanceburg

May 14, 1976

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EXAMPLE OF CALCULATION TO ILLUSTRATE EFFECT OF INCOME TAXES ON NET POWER BENEFITS

Computation of Net Power Benefits, Cannelton Project No. 2245

1. Cannelton Project No. 2245	Appendix A to Order		Calculation Using 2% Annual Cost to Represent Effect of Income Taxes
Installed Capacity 70.56 MW			
Est. Average Annual Generation 340 GWh			
Est. Dependable Capacity 32.5 MW			
Estimated Capital Cost, 1/75 $33,914,000			
Est. Power Supplied to U.S. Government			
Energy — 0.648 GWh			
Capacity — 0.394 MW			
Estimated Annual Cost			
Fixed (33,914) (.1126)	$3,818,700	x 0.1326	$4,497,000
O & M & A & G	146,000		146,000
FPC Annual Charge	5,600		5,600
Total	$3,970,300		$4,648,600
2. Steam Electric Plant Alternative			
(2-500 MW Units w. Cooling Towers)			
Estimated Capital Cost (1/75)	$/kW		
Steam Plant	363.74		
Transmission	49.70		
Total	413.44		
Estimated Annual Cost			
Fixed $(413.44) x 0.1181	48.83	x 0.1381	57.10
O & M A & G	2.63		2.63
Fuel, fixed & inventory	4.72		4.72
Total	56.18		64.45
Estimated Variable Cost	7.91	mills/kWh	
3. Estimated Annual Value			
Capacity[1] (31,960-394) kW x $56.18/kW	= $1,773,400	x $64.45	= $2,034,400
Energy (340,000-648) MWh x $7.91/MWh	= $2,684,300		= $2,684,300
Total			$4,718,700

4. Estimated Net Power Benefit

$4,457,700 — $3,970,300 = $487,400

$4,718,700 — $4,648,600 = $ 70,100

[1] $\frac{\text{Hydro adjustment}}{\text{dependable capacity}} \times \frac{\text{probability of meeting load-hydro}}{\text{probability of meeting load-steam}}$

$$32{,}500 \times \frac{0.87771}{0.89257} = 31{,}960$$

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

REHEARING

Before Commissioners: RICHARD L. DUNHAM, *Chairman;* DON S. SMITH, JOHN H. HOLLOMAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY } Project No. 2245

ORDER GRANTING REHEARING FOR THE PURPOSE OF FURTHER CONSIDERATION

(Issued May 27, 1976)

On April 27, 1976, the City of Vanceburg, Kentucky (Vanceburg) filed a timely petition for rehearing of our Order of March 29, 1976, in which we issued a license to Vanceburg to construct, operate, and maintain the Cannelton Project No. 2245. On May 14, 1976, Vanceburg filed a document entitled "Motion of the City of Vanceburg, Kentucky to Supplement its Petition for Rehearing."

The Commission finds:

It is appropriate and in the public interest to grant rehearing for the purpose of further consideration in connection with the above noted documents filed by Vanceburg.

The Commission orders:

Rehearing is hereby granted for the purpose of further consideration in connection with the above noted documents filed by Vanceburg.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

REHEARING; ANNUAL CHARGES

Before Commissioners: RICHARD L. DUNHAM, *Chairman;* DON S. SMITH, JOHN H. HOLLOMAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY } Project No. 2245

ORDER ON REHEARING

(Issued June 21, 1976)

On April 27, 1976, the City of Vanceburg, Kentucky (Vanceburg) filed a timely petition for rehearing of our order of March 29, 1976, in which we issued a license to Vanceburg to construct, operate, and maintain the Cannelton Project No. 2245. On May 14, 1976, Vanceburg filed a document entitled "Motion of the City of Vanceburg, Kentucky to Supplement its petition for Rehearing." By order of May 27, 1976, we granted rehearing for the purpose of further consideration in connection with these filings. We will discuss these filings separately.

As grounds for the timely petition for rehearing filed on April 27, 1976, Vanceburg states that Vanceburg is a municipal corporation of the Commonwealth of Kentucky and that Vanceburg Electric Light Heat and Power System is a corporate entity owned by the city. Vanceburg further states that East Kentucky Power Cooperative (East Ken-

tucky), with whom Vanceburg has an agreement,[1] is a non-profit, Federal income tax exempt generation and transmission cooperative consisting of eighteen member distribution cooperatives. Vanceburg also states that Appendix A of the order, which sets forth the economic feasibility analysis, fails to consider power provided free of cost by the Vanceburg Electric Light Heat and Power System to the City of Vanceburg. Vanceburg requests that the Commission grant rehearing for the above noted reasons and moves that the order of March 29, 1976, be made final.

While the grounds for the rehearing have been set forth in the rehearing, the relief requested by Vanceburg is not

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clear.[2] Section 313(a)[3] of the Federal Power Act (Act) and Section 1.34[4] of our Rules of Practice and Procedure contemplate that the relief desired should be specified in an application for rehearing in order that the grounds contained in the rehearing can be evaluated in the context of a requested remedy. *See, Puget Sound Power & Light Company*, Project No. 2493, 54 F.P.C. ____ (July 11, 1975). By failing to specify a remedy in its rehearing, Vanceburg has not demonstrated precisely how it is aggrieved by the Commission's order of March 29, 1976.

In any event, we construe Vanceburg's application as a request for exemption from the payment of annual charges.

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[1]This agreement is discussed in our prior order for this project and in the Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Projects Nos. 2614 and 2704, which was also issued on March 29, 1976.

[2]It is not clear, for example, whether Vanceburg requests that Article 57 of the license, which discusses annual charges, be amended or deleted, or whether Vanceburg requests that an exemption from annual charges be granted. The relief is, at best, only implicitly stated. The only relief explicitly requested is that the order of March 29, 1976, be made final.

[3]16 U.S.C. §825 1(a).

[4]18 C.F.R. §1.34 (1975).

The annual charges, which are specified in Article 57 of the license, fall into three groups: (a) annual charges for the use, occupancy and enjoyment of United States land, (b) annual charges for administration of Part I of the Act, and (c) annual charges for the use of a Government dam. It may well be important to distinguish these groups.[5] It should be noted that Section 10(e)[6] of the Act provides that "in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam." Thus, even assuming that Vanceburg would otherwise qualify for an

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exemption from any of those groups of annual charges, we may not be able to grant such an exemption, particularly for annual charges for the use of a Government dam, consistent with the above noted proviso of Section 10(e). However, because we conclude hereinafter that any request for an exemption from annual charges is not properly before us at this time and that, even assuming that such a request is properly before us, Vanceburg's showing in support of the request for exemption is not sufficient, we do not reach the question of whether an exemption from annual charges can be granted consistent with the above noted proviso of Section 10(e). By mentioning the distinctions between and separate problems presented by the various types of annual charges, we do hope to alert Vanceburg to the issues involved so that any future request by Vanceburg for an exemption will focus on these matters in a meaningful fashion.

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[5]In instances not involving the use of a Government dam, exemptions have been granted from annual charges for administration of Part I of the Act or for the use, occupancy and enjoyment of lands of the United States. *See, e.g., South Carolina Public Service Authority*, Project No. 199; *City of Seattle, Wash.*, Projects Nos. 553, 2144.

[6]16 U.S.C. §803(e).

Vanceburg's request for an exemption from annual charges, and the grounds which allegedly support the request, are not properly before the Commission at this time. At some time after the project begins generating power, Vanceburg will have an opportunity to submit applications, together with such supporting information, as may be necessary to justify an exemption from the annual charges required by Section 10(e) of the Act. The procedure for filing such an application is set forth in Section 11.24 of our Rules and Regulations. 18 C.F.R. §11.24 (1975). These applications must be filed annually. However, until these applications, with supporting documents, are filed and evaluated, any request for exemption from annual charges is not properly before us. *See, California Oregon Power Co.* v. *FPC,* 239 F. 2d 426 (D.C. Cir. 1956). No useful purpose would be served by engaging in speculative deliberations on matters such as exemptions from annual charges to be assessed in future years.

The extensive legislative history of Section 10(e) of the Act reveals that it was one of the most controversial sections of the Act. Decisions concerning that section should be made only after all relevant factors are evaluated. Also, of course, there is the possibility that the project might not be constructed and thus annual charges would never be billed.

Even assuming *arguendo* that this request for exemption is properly before us, Vanceburg's request for an exemption from annual charges on the ground that it is a municipality

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and sells power to a cooperative is deficient for another reason. The mere fact that Vanceburg is a municipality and sells an unspecified amount of power to a cooperative is not sufficient to justify an exemption. Vanceburg must

also demonstrate that power from the project is "sold to the public without profit or is used by such State or municipality for State or municipal purposes" or that the project is "primarily designed to provide or improve navigation" within the meaning of Section 10(e) of the Act. The exemption provisions of Section 10(e), particularly the "without profit" provision, have been the subject of litigation. *Power Authority of the State of New York* v. *FPC,* 339 F. 2d 269 (2nd Cir. 1964); *Central Nebraska Public Power & Irr. Dist.* v. *FPC,* 160 F. 2d 782 (8th Cir. 1947). Section 11.24 of our Rules and Regulations also discusses these statutory criteria in the context of State or municipal uses, sales of power to the public, sales of power for resale, and interchange of power. The marketing plan for power from this project contemplates that uses and sales in several of these categories will occur; but Vanceburg has not demonstrated how much power from the project will be used in these various categories. In the absence of a showing sufficient to justify an exemption on one or more of these three grounds, we find that Vanceburg is not entitled to a total or partial exemption from the payment of annual charges merely because it is a municipality and sells an unspecified amount of project power to a cooperative. *See, Grand River Dam Authority,* Project No. 2183, 16 F.P.C. 1330 (1956). The threshold showing made by Vanceburg is not adequate when measured against the requirements of the Act.

In connection with the power that Vanceburg Electric Light Heat and Power System provides free of cost to the licensee, City of Vanceburg, it is unclear whether Vanceburg uses this ground as support for its request that a total or partial exemption be granted, or whether it is contending that the annual charges for use of a Government dam specified in Article 57, which was based on Appendix A of our

order, are unreasonable because this factor is not taken into account. Our discussion heretofore concerning Section 313(a) of the Act and Vanceburg's failure to specify a remedy applies equally to this contention.

Insofar as the provision of power free of cost to the City of Vanceburg may affect the reasonableness of the charge specified in Article 57, Vanceburg has not provided factual

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data to support this contention, even assuming that the provision of power free of cost by the Vanceburg Electric Light Heat and Power System to the City of Vanceburg (i.e., the transfer of power by Vanceburg to Vanceburg) is germane to our disposition.[7] Vanceburg's allegation is insufficient to cause us to change our specific finding that the annual charges for this project are reasonable.

To the extent that the transfer of power from the Vanceburg Electric Light Heat and Power System to the City of Vanceburg is relevant and can be deemed to be for municipal purposes, then this factor goes to the question of exemption, not to the question of the reasonableness of the annual charges. The use of power for municipal purposes is distinguishable from the furnishing of power free of cost to the United States for operation of navigation facilities. This latter use required by Section 11(c)[8] of the Act does affect the reasonableness of the annual charges, while the former transfer and use for municipal purposes does not affect the reasonableness of the annual charges but rather

[7]The license was issued to the City of Vanceburg. The relevant issue, therefore, is the disposition by the City of Vanceburg of power from this project, not any disposition of power by the Vanceburg Electric Light Heat and Power System to the City of Vanceburg. The Vanceburg Electric Light Heat and Power System is apparently a creature of and agent for the City of Vanceburg, not an independent agent bargaining at arms length with the City.

[8]16 U.S.C. §804(c).

is provided for by the exemption provisions of Section 10(e) of the Act.

Insofar as the provision of power free of cost by the Vanceburg Electric Light Heat and Power System to the City of Vanceburg, may justify a total or partial exemption from the payment of annual charges, this issue is not properly before us at this time for the reasons heretofore noted. When Vanceburg files applications for total or partial exemption, with supporting data, we can then decide the issue of Vanceburg's exemption based on the use of power from the project for State or municipal purposes or on the sale of power from the project to the public without profit.

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Turning to the document filed on May 14, 1976, we are at the outset confronted with a procedural question. While the issue of annual charges is also the subject of this document, Vanceburg now questions the reasonableness of the annual charges. The prior filing of April 27, 1976, which we have heretofore discussed, for the most part did not question the reasonableness of the annual charges but rather addressed the question of exemption from annual charges assumed to be reasonable.

Furthermore, the May 14, 1976, document was filed more than thirty days after the period set forth in Section 313(a) of the Act. The Commission's consistent practice has been to accord documents filed after the thirty day period the status of a motion for reconsideration.[9] To accord documents filed after the thirty day period the status of rehearings would give parties more than the thirty days authorized by statute, would prevent the orderly disposition of matters contained in these documents, and would entail

[9]*See, e.g.*, Opinion 698-A, *Appalachian Power Company*, Project No. 2317, 52 F.P.C. 317 (1974).

piecemeal, periodic revisions of orders disposing of rehearings. Thus, absent Vanceburg's filing of April 27, 1976, there is no question that the May 14, 1976 document would not be considered a rehearing. While we note that the document filed May 14, 1976, was not filed within thirty days of the date of issuance of our order of March 29, 1976, we also note that this document raises a separate, but related, issue to those issues raised in the timely petition for rehearing. Accordingly, we will, in the exercise of our discretion, consider the matters raised in the May 14, 1976, filing.

Vanceburg objects to the Commission's treatment of Federal and state income taxes in making the economic feasibility analysis set forth in Appendix A of our order. That analysis, which accurately reflects Vanceburg's tax exempt status, compares the estimated annual costs of the proposed hydroelectric project to the estimated annual costs of producing an equivalent amount of power from the least expensive alternative. One half of the difference between these two figures

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is then assessed as the annual charge for use of a Government dam.[10] Vanceburg notes that, if it were an investor owned utility, it would pay Federal and state income taxes which Vanceburg estimates would add two percent to the estimated annual fixed costs of the least expensive alternative. Since the estimated investment cost for the Cannelton Project is greater than the investment cost for the alternative to this project[11], any increase in estimated annual fixed charges by treating Vanceburg as an investor owned utility acts to reduce both the economic feasibility of the hydro-

[10]Our Order of March 29, 1976, contains a more complete discussion of this method.

[11]*See*, Appendix A of our March 29, 1976, order.

electric project and the amount of annual charges to be assessed for use of a Government dam. Vanceburg's calculation on this basis shows that the estimated annual net power benefits of the project are $70,100 and that a reasonable annual charge for use of the Government dam based thereon is $35,050. These figures are comparable to the $487,400 figure for the estimated annual net power benefits and the $243,700 annual charge figure for use of the Government dam in our order of March 29, 1976. Both of these figures reflect Vanceburg's tax exempt status.[12] Since we disagree with Vanceburg's claim that it should be treated as if it were an investor owned utility for the purpose of computing annual charges for use of a Government dam, we do not reach the issue of whether Vanceburg's suggested two percent figure to account for Federal and state income taxes is appropriate.

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Initially, we note that it is anomalous to consider Vanceburg's tax exempt status when determining the economic feasibility of the project, a treatment which benefits Vanceburg and its application; but then to ignore Vanceburg's tax exempt status, and treat Vanceburg as an investor owned utility, for the purpose of determining annual

[12]Vanceburg's own filing of January 8, 1973, relating to the economic feasibility of both this project and the Greenup Project No. 2614 shows that the estimated annual net benefit were $1,293,487 for this project and $1,607,597 for the Greenup Project No. 2614. Using the sharing of the net benefit method, annual charges for the use of a Government dam based on these figures would be approximately $647,000 for this project and $804,000 for the Greenup Project No. 2614. While we believe Vanceburg's own analysis of January 1973 overestimates the annual net benefits of these two projects and the annual charges based thereon (i.e. lower figures and charges are appropriate), it is important to note that Vanceburg's own analysis was also predicated on its exemption from Federal and state income taxes.

charges.[13] Furthermore, Vanceburg's two filings compel the conclusion that Vanceburg wants to be considered as an investor owned utility for the purpose of computing a reasonable annual charge, but as a tax exempt municipality for the purpose of claiming an exemption from reasonable annual charges. We do not believe that Vanceburg can logically claim that according such a chameleon-like status to a municipality is consistent with the Act.

We believe that, in order to be reasonable, annual charges for the use of a Government dam under the sharing of the net benefits method must be based on the *specific* project at issue and the *specific* applicant or licensee for that project. Only by considering the specific facts of each application can we arrive at a reasonable charge, one that will also be equitable to all utilities, whether public or private in character. In this case the specific licensee is a municipality. To treat Vanceburg as an investor owned utility for the purpose of computing annual charges is to give substance to a fiction. We cannot agree with this proposed treatment.

Furthermore, our treatment does not, as Vanceburg suggests, collect as annual charges all the tax savings which Vanceburg would otherwise realize. The practical effect of our treatment is to exact one half, not all, of these tax savings as part of the reasonable annual charge for use of the Government dam. This result, we believe is reasonable. By annual charges we assess a rental for the use of Federal property; and the sharing of the net benefits method appropriately

[13]We can envision situations where the development of power at a Government dam would be economically feasible by a tax exempt entity but not by an investor owned utility. The logic of Vanceburg's position would dictate that the annual charges for development by a tax exempt entity be based on development by an investor owned utility. That annual charge would be zero. We do not believe that this result, which follows from Vanceburg's argument, is appropriate or, for that matter, consistent with the Act.

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considers the value of that Federal property, namely the Government dam, to the specific licensee. Licensees, whether tax paying or tax exempt, pay one half of the value of that Federal property to the licensee. It is improper to treat the use of this property as Vanceburg would have us treat it, especially where, as here, the sharing of the benefits method, in effect, gives Vanceburg full credit for its exemption from Federal and state income taxes on the one half of the net benefits it receives by providing the facilities to generate the power.

The Commission finds:

The documents filed by Vanceburg on April 27 and May 14, 1976, present no facts or legal arguments that require any change or modification of our order of March 29, 1976, issuing a license for the Cannelton Project No. 2245.

The Commission orders:

The above noted documents filed by Vanceburg are hereby denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

LICENSE (MAJOR)

Before Commissioners: RICHARD L. DUNHAM, *Chairman;* DON S. SMITH, JOHN H. HOLLOMAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY	}	Project No. 2614
OHIO POWER COMPANY	}	Project No. 2704

ORDER ISSUING LICENSE (MAJOR) AND DISMISSING APPLICATION FOR PRELIMINARY PERMIT

(Issued March 29, 1976)

The City of Vanceburg, Kentucky (Vanceburg or Applicant) filed on December 17, 1969, and supplemented on August 23, 1970, January 21 and April 21, 1971, November 1, 1972, January 8 and May 1, 1973, and March 8, October 4, December 4, and December 20, 1974, an application under Section 4(e) of the Federal Power Act (Act) for a major license to authorize the construction, operation, and maintenance of the proposed Greenup Project No. 2614, to be located at the U. S. Army Corps of Engineers (Corps) Greenup Locks and Dam on the Ohio River.

Applicant proposes to construct a powerhouse with an installed capacity of 70,560 kW and appurtenant facilities. The project, excluding the transmission line, will be located in Scioto County, Ohio, in the vicinity of the cities of Portsmouth, Ironton, and Wheelersburg, Ohio, and Huntington,

West Virginia, on the Ohio River between Ohio and Kentucky at the Greenup Locks and Dam, 341.0 miles below Pittsburgh, Pennsylvania. The project will affect lands of the United States, will be located on a navigable waterway of the United States, and will utilize the surplus water or water power from a Government dam within the meaning of the Act. The 71-mile-long, 138 kV transmission line will be located in Greenup, Lewis, and Mason Counties, Kentucky, near the cities and towns of Greenup, South Shore, Vanceburg, Maysville, Washington, Lloyd, South Portsmouth, Saint Paul, Quincy, Garrison, and Tollesboro, Kentucky.

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The Greenup Project No. 2614 will be on the Ohio River on the East (Ohio) side of the Corps' dam, and will include a concrete powerhouse, to be constructed immediately downstream of an existing overflow weir, containing three submerged bulb-type Kaplan hydroelectric generating units with a total installed capacity of 70,560 kW; an intake canal; a tailrace canal; a single-circuit, 71-mile-long, 138 kV transmission line; recreation facilities; and other appurtenant facilities more fully described hereinafter.

About 150 feet of the center of the weir will be removed and a concrete intake canal will be built in its place. The canal will connect the powerhouse to the remaining portions of the weir. The top of the powerhouse will be built at the same elevation as the existing weir (517.0 feet) so that, when flooding conditions make the locks inoperable, the barges and other traffic can pass over the powerhouse. Such traffic currently passes over the weir under similar conditions.

Vanceburg plans to construct a single circuit, 138 kV transmission line of wood pole, H-frame construction, except for the river crossing which would be supported by two steel or aluminum towers. The line would begin at the

project step-up substation and proceed 4 miles to East Kentucky's Argentum Substation, then 28 miles to Vanceburg's Black Oak Substation, then 13 miles to East Kentucky's Charters Substation, then 26 miles to East Kentucky's Charleston Bottoms Steam-Electric Generating Station (Maysville) for a total of approximately 71 miles. We conclude that the generator leads, the Greenup substation, the 138 kV Greenup-Charleston Bottoms transmission line, and appurtenant facilities are part of the "project" as defined by §3(11) of the Act [16 U.S.C. 796(11)].

Vanceburg will use the power generated at the project to meet its load requirements and will sell any remaining power from the project to East Kentucky Rural Electric Cooperative Corporation of Winchester, Kentucky (EKRECC), in accordance with a Memorandum of Agreement dated February 18, 1970, as amended February 1, 1972, and filed as part of Exhibit U on January 8, 1973. Pursuant to the agreement between EKRECC and Vanceburg, power from the project will be delivered to EKRECC and Vanceburg over the project transmission line. The marketing of power from the project and issues related thereto are more fully discussed hereinafter.

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Notice of the application was given on March 12, 1971, with May 24, 1971, as the last day for filing protests or petitions to intervene. The Ohio Public Utilities Commission filed a notice of intervention pursuant to Section 1.8(a)(1) of the Commission's Rules of Practice and Procedure on March 29, 1971. Ohio Power Company of Canton, Ohio, fined a petition to intervene on May 20, 1971. By order issued April 21, 1972, the Commission granted this petition to intervene.

On June 7, 1974, the Kentucky-Indiana Municipal Power Association (KIMPA) submitted an untimely petition to

intervene. By order issued December 4, 1974, the Commission accepted the petition for filing and granted the intervention.

Additional notice of the application was given on December 4, 1974, with February 3, 1975, as the last day for filing protests or petitions to intervene. KIMPA filed a protest on February 3, 1975. No other protests, notices of intervention, or petitions to intervene were filed. Issues raised by KIMPA and Ohio Power Company are more fully discussed hereinafter and in the Order Issuing License (Major) for the Cannelton Project No. 2245.

By letter dated June 28, 1971, the Corps stated that the proposed project appeared to fall within the categories of projects which are appropriate for non-Federal development and indicated that the plans of the structures affecting navigation were generally satisfactory. The Corps also reported that: (1) use of the area of the overflow weir for a powerhouse was not anticipated in the design of the dam and, if it is found to be not feasible, the powerhouse may have to be relocated and the construction scheme changed; (2) the powerplant structures must be designed to absorb seismic loads and possible impact from one or more floating barges; (3) planning should be coordinated with the Corps; (4) the Corps should be furnished operating schdules; (5) training walls or deflecting piers may be needed; (6) the U.S. dam was built to be capable of supporting a future Kentucky roadway and/or bridge and the hydro plant should be similarly designed; (7) the transmission line should not interfere with floating cranes or radio communications; (8) Applicant should provide measures to eliminate existing bank erosion; and (9) the recreation use plan is generally satisfactory.

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In light of these statements, the Corps recommended the inclusion of certain standard and special articles. Spe-

cifically, the Corps recommended that Articles 5 through 9 inclusive of Standard Form L-6 be included in the license. *See Form L-6: Unconstructed Major Project Affecting Navigable Waters and Lands of the United States,* 34 F.P.C. 1114 (1965). Revised versions of these articles have been included in the license as Articles 12 and 21 to 24 inclusive, pursuant to the revision of this Form recently issued. We have not, however, incorporated the Corps' recommendation that Article 12 make specific reference to the reservation in the United States of the right to prescribe the use of water so as to mitigate adverse water quality effects. The right of the United States to prescribe the use of water so as to mitigate adverse water quality effects is subsumed in existing Article 12, thus obviating the necessity for express reference.

The Corps also recommended the inclusion of certain special articles in the license, if issued. These articles relate to: (1) Corps review and approval of design and construction of facilities affecting navigation and public use and recreation; (2) the need for an operating agreement prior to initiation of power operations; (3) provision for the installation of a deflecting pier or wall, if necessary; (4) reimbursement by Licensee of all costs incurred by the Government for the specific and sole purpose of accommodating the power installation; (5) the furnishing of power plant operating schedules to Corps personnel; (6) waiver by Licensee of claims against the United States based on changes in pool levels at the Greenup Locks and Dam and the downstream Anthony Meldahl Locks and Dam; (7) the need for disposal of trash in accordance with Federal, State, and local laws and regulations; and (8) provisions for lights, signals, and protective and warning devices to protect navigational and recreational use. By letter filed January 15, 1973, Vanceburg indicated that it

did not object to these articles recommended by the Corps. Based on the factual recitals in the Corps' letter and our own independent analysis, we believe that it is in the public interest to incorporate these special articles in the license. These conditions are set forth as Articles 38, 42, 45, and 47 through 51 inclusive.

An additional article suggested by the Corps relates to the release of the Government from liability with respect to the construction, operation, and maintenance of both the

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project and the Greenup Locks and Dam and the payment by Licensee of legal expenses related to suits against the United States. Vanceburg indicated in its letter filed January 15, 1973, that comments would be forthcoming concerning this article. To date Vanceburg has not filed a response. For the reasons set forth in our order issuing a license for the Racine Project No. 2570, we have provided in Article 43 for the release of the United States from liability, arising out of the construction, operation, and maintenance by the United States of the Greenup Locks and Dam, only during the time Vanceburg's agents are engaged in the construction, operation, and maintenance of the power project. *Ohio Power Company,* Project No. 2570, 50 F.P.C. 2020 (1973).

By letter filed December 16, 1974, the Corps stated that it did not object to revision of the application to include the 71-mile-long project transmission line.

By letter filed August 2, 1971, the United States Department of the Interior (Interior) stated that the Greenup Project is one of seven main stem Ohio River continuous record gaging stations, and recommended that Winter-Kennedy piezometer taps be incorporated into the turbines to aid in the measurement and monitoring of the Ohio River flows. Article 8 requires the installation of stream gages, meters, and other measuring devices.

Interior recommended that, whenever possible, the turbine variable pitch blade be adjused to accommodate optimum fish passage, and that runner speed be reduced to the slowest functional speed. The desirability of and necessity for these measures for the protection and enhancement of fishery resources can better be evaluated once the project is operational. We are requiring the filing of a revised Exhibit S, to include the conclusions of studies to determine the impact of the project on fishery resources, within three years from the date of commencement of operation of the project.

Interior also stated that the Exhibits R and S were adequate, but suggested that Vanceburg coordinate with the State of Ohio to determine if the proposed observation and fishing platforms are sufficiently large to accommodate the expected number of visitors. Vanceburg indicates in its Exhibit R, which we approve, that it will coordinate with Interior, the Corps, and the State of Ohio before constructing these facilities.

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Finally, Interior suggested that Vanceburg consult with appropriate State agencies regarding the effect of the project, if any, on archeological or historical values and that any investigations for archeological or historical purposes should be funded by Applicant and completed prior to construction. By letter dated February 2, 1973, the Ohio Historical Society indicated that the project would not affect any known prehistoric or historic landmarks eligible for the National Register of Historic Places. The Kentucky Heritage Commission, by letter dated October 8, 1975, recommended a survey of the project area to determine the presence of historical or archeological sites. We have provided, in the license, for historical and archeological surveys consistent with these agencies' recommendations.

By letter filed February 1, 1973, Vanceburg concurred in Interior's recommendations.

Interior, in its letter dated December 12, 1974, indicated that the project would not affect any interests of the National Park Service but expressed concern over the suitability of the foundations for the project structures and over the measures that would be taken for the control of erosion and sedimentation during construction. We have provided in the license for Corps and Commission review of plans of project structures before construction. Articles 19 and 21 of the license provide for the control of erosion and sedimentation during construction.

With respect to the revised transmission line route, Interior noted that all but seven miles of the transmission line right-of-way would utilize an existing right-of-way, and indicated that mineral and water resources would not be adversely affected by the transmission line right-of-way. Interior recommended that consideration be given to providing recreational opportunities on the planned seven miles of new right-of-way. Pursuant to the provisions of Article 39, Vanceburg is required to consult and cooperate on a continuing basis with appropriate Federal, State, and local environmental agencies for the protection and development of the natural resources and values of the project area. A determination can be made under this article on the desirability of developing the transmission line right-of-way for recreational purposes.

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By letter dated July 9, 1971, the U.S. Department of Agriculture, Forest Service (Forest Service) stated that the project would not affect lands administered by the Forest Service and that construction of the project by the United States is not recommended.

Additional comments of the Forest Service by letter dated April 27, 1971, and the response to these comments by Vanceburg dated January 5, 1973, relate to the transmission line right-of-way which was subsequently rerouted to utilize existing rights-of-way for 64 miles of its 71 mile length. Thus, these comments are not germane to consideration of the application as supplemented. By letter filed December 24, 1974, the Forest Service commended the decision to reroute the transmission line.

The U.S. Department of Health, Education and Welfare by letter dated April 23, 1971, stated that the sanitation facilities for the recreation area are satisfactory.

By letter dated January 22, 1975, the U.S. Environmental Protection Agency (EPA) recommended that air be injected into water flowing through the turbines in the interest of maintaining a minimum dissolved oxygen level. Article 54 of the license provides for such air injection facilities in the interest of maintaining adequate dissolved oxygen.

EPA also recommended a special article giving the Commission authority to modify project operations and facilities in order to maintain or improve water quality. As heretofore noted in connection with a similar recommendation by the Corps, this authority is reserved in the license, particularly in Articles 9 and 12. With respect to EPA's recommendation that adequate erosion control measures be practiced during the construction of the transmission line to minimize erosion and sedimentation, Articles 19 and 21, which we have heretofore noted, provide for the control of erosion and sedimentation during construction of the line.

By letter dated March 18, 1971, the Kentucky Department of Fish and Wildlife Resources stressed the need for air injection in the turbines and for the recreational facil-

ities outlined in the Exhibit R. Subsequently, by letter dated November 17, 1974, the Kentucky Department of Fish and Wildlife Resources enclosed a copy of a report discussing their

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standard measures for managing transmission line rights-of-way for wildlife purposes. We cannot say, at this time, that implementation of these measures would be desirable with respect to the specific transmission line right-of-way with which we are concerned, especially in light of the alternative, and possibly conflicting, uses which the right-of-way could support. The desirability of implementing these recommendations should, however, be discussed in the detailed plan required by Article 52 and, subsequently, in the revised Exhibit S filed pursuant to the provisions of Article 55.

By letter dated May 6, 1971, the Ohio Department of Natural Resources stated that the project would not have an adverse environmental impact.

The Ohio Highway Department, in its letter of April 15, 1971, stated that the application does not consider the possibility of construction of a highway bridge across the Ohio River at the Greenup Locks and Dam, nor does the application discuss the compatibility of the substation and power lines with this bridge. By letter dated January 15, 1973, Vanceburg indicated that project facilities would be constructed so as not to interfere with possible future construction of a highway bridge.

The Kentucky Water Pollution Control Commission on September 6, 1972, certified that it has resasonable assurance that applicable water quality standards will not be violated by the project. On October 26, 1972, the Kentucky Water Pollution Control Commission deleted the one year limitation on certification set forth in its September 6, 1972, letter.

We have examined the environmental aspects of the project. Construction of the project in the vicinity of the Greenup Locks and Dam will result in increased siltation during the excavation for project structures in the vicinity of the weir. Pursuant to provisions of the license heretofore noted, Vanceburg is required to take measures to prevent soil erosion and to excavate in such a manner as to preserve project environmental values and so as not to interfere with land or water traffic.

We have considered fish and wildlife values in the vicinity of the project. Commercial fishing on the Ohio River has been of economic importance in the past. However, commercial fishing has declined in recent years, due partly

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to pollution, decreased profitability, and land use changes. Sport fishing is a popular activity near the dam. Fish common to the Ohio River include mooneye, lake sturgeon, grass pickerel, largemouth bass, white bass, American eel, catfish, freshwater drum, walleye, and sauger.

Wildlife in the project area include bobwhite quail, ring-necked pheasant, squirrel, fox, cottontail rabbit, white-tailed deer, raccoon, muskrat, mink, and beaver. The most abundant game animals in the project area, and those sustaining the greatest hunting pressure, are the cottontail rabbit and the white-tailed deer. Waterfowl occur in the area, but this reach of the Ohio is outside principal waterfowl routes and flyways. No rare or endangered species of fish or wildlife would be affected by the project.

We have considered fish and wildlife aspects of license issuance under the assumption that commercial and sport fishing will increase with improving water quality and advances in fisheries management techniques. The absence of anadromous fish from the Ohio River obviates the need

for fish passage facilities. Two variables which affect survival rates of fish passing through turbines are the amount of head and the setting of the turbine blade. The low head at the project and the fact that the turbine runner blades can be adjusted are factors which are beneficial to fish survival rates. We are requiring the filing of a revised Exhibit S, based on the results of post-operational studies carried out in cooperation with interested Federal and State agencies, to determine the effect of project operation on the fisheries resources and to measure the effectiveness of the reaeration facilities in maintaining desired dissolved oxygen concentrations. Should additional fish protective measures be warranted, we have reserved sufficient authority under the license to require these measures.

Since 64 miles of the 71 mile transmission line right-of-way will utilize existing rights-of-way which would not have to be widened, only the clearance of seven miles of new transmission line right-of-way will generate potentially significant impacts on wildlife. The seven miles of new rights-of-way would occur in five separate segments. Two segments, approximately 1.8 miles and 1.0 mile in length, would traverse cleared lands. The remaining 4.2 miles of new right-of-way would be about evenly divided among three segments, all of which are timbered lands. Selective

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clearing or clear-cutting, in lieu of shear clearing, should be used during clearance of the transmission line right-of-way, where feasible, to minimize disturbance to the topsoil and the need for revegetation. Any exposed soil surfaces should be stabilized and revegetated as soon as possible. Where the right-of-way is cleared through a forested area, consideration should be given to managing vegetation by applying herbicides to the base of individual trees. This method prevents trees from interfering with power lines

while maximizing the opportunity for shrubs and vines to occupy the right-of-way. We are requiring Vanceburg to file its detailed plan for avoiding or minimizing any disturbance caused by construction and maintenance of the project works to the natural, scenic, historical, and recreational values of the area. Measures to enhance the value of the transmission line right-of-way for wildlife will be considered in the context of the revised Exhibit S which we require Vanceburg to file.

An existing 30-acre roadside park, consisting of recreational, picnic, and toilet facilities, is situated adjacent to the proposed powerhouse. The facilities were constructed by the Corps of Engineers and are now leased to the Ohio Department of Highways. This park was visited by an estimated 210,000 people in 1970, primarily due to the proximity of the park to U.S. Highway 52. Vanceburg has stated that measures will be taken to minimize disurbances to this park during construction.

In its Exhibit R, Vanceburg proposed the development of recreational facilities, consisting of upper and lower fishing platforms and an observation platform, near the project powerhouse. The fishing platforms would be connected by means of a metal stairway and would be located at the edge of the water on the Ohio side. The fishing and observation platforms would be connected to an existing pedestrian walkway and parking area by means of a roadway bridge. Concrete benches and adequate illumination would be provided at each platform. Upon completion of these proposed recreational facilities, Vanceburg estimates recreational use at the existing and proposed facilities will increase to 500,000 visitors annually and ultimately as many as 800,000 visitors annually. We conclude that the Exhibit R complies with Commission regulations and should be approved as a part of the license.

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The National Register of Historic Places, established under the provisions of the National Historic Preservation Act of 1966,[1] has been consulted. While the Kentucky Heritage Commission, in its letter dated October 8, 1975, indicated that the survey of historic and archeological resources in Kentucky is incomplete, we note that no listed properties, eligible properties, or State inventory properties are located in the vicinity of the project. We have provided for archeological and historical surveys in Articles 40 and 41, respectively.

We have considered alternatives to the project. The alternative of denial of the application was considered. Even assuming that Vanceburg is unsuccessful in attracting industry to utilize the power and, thus, cannot utilize all the power itself, the electric power demands of the combined EKRECC-Vanceburg system will require development of an equivalent amount of power. Furthermore, while electric energy conservation practices may initially reduce the need for this capacity by lessening the growth in energy demand, we believe the public interest would best be served by issuing a license and allowing the development of water resources which otherwise would not be utilized, especially where, as here, the dam is in existence and environmental impacts are not significant. Indeed, because the project is located at an existing Government dam, which can accommodate hydroelectric generating equipment, no other conventional hydroelectric site is considered a reasonable alternative. Since the project will be operated as a run-of-the river facility at an annual plant factor of approximately 50 percent, pumped storage hydroelectric projects and gas turbine facilities, which serve peaking functions, are not considered reasonable alternatives.

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[1] 16 U.S.C. §470.

Of those alternatives which have a comparable plant factor, fossil fueled steam electric generating units are considered the most viable alternatives. Our studies indicate that a fossil fueled unit sized to meet the needs of a combined EKRECC-Vanceburg system would not provide power as economically as the power to be produced at Greenup. Furthermore, such a fossil fueled unit would utilize a nonrenewable resource with attendant air quality problems.

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The issuance of this license for the construction and operation of Project No. 2614 will provide for the use of a renewable resource to produce an average of 300,000,000 kilowatt-hours of electric energy annually. This will conserve fuel resources equivalent to 480,000 barrels of oil annually.

We have examined the economic and financial feasibility of the project. With respect to financial feasibility, Applicant has demonstrated that it can secure the necessary financing to construct the project through the issuance of revenue bonds. *See* discussion *infra*.

Based on our studies, a fossil fueled steam-electric generating facility, which is the least expensive alternative energy source, could provide capacity and energy equivalent to that estimated to be generated at the project at an annual cost of $4,418,800. The annual cost of producing power from the project is estimated to be $3,963,000. In light of the facts that the estimated cost of producing power from the project is less than the estimated cost of producing an equivalent amount of power from a suitable alternative and that an adequate market for the power has been demonstrated, we conclude that the project is feasible from an economic standpoint.

Section 10(e) of the Act, 16 U.S.C. §803(e), requires the Commission to fix a reasonable annual charge to be paid to

the United States for the use of a Government dam. The Commission has had occasion to exercise this power many times in the past. Such prior practice has resulted in the consistent use, for a duration exceeding 40 years, of a process known as the "sharing of the net benefits" method. Generally, this method involves calculating the difference between the cost of the proposed hydroelectric development and the cost of producing an equivalent amount of power from the least expensive alternative. This difference is the net benefit to be derived from developing the power potential of the Government dam. Half of this figure is then assessed as the annual charge for use of the Government facility, thus dividing the value of the net benefit equally

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between the licensee and the Government.[2] The "sharing of the net benefits" method has been used on a consistent basis except when the Commission has approved a settlement of the annual charges issue or when an annual charge has been suggested, usually by another Federal agency, and found to be reasonable as proposed. Indeed, the "sharing of the net benefits" method was used to fix charges in the licenses for Markland Project No. 2211 and Racine Project No. 2570 which, like the Greenup Project, are integrated with Government navigation dams on the Ohio River.[3]

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[2]For a fuller elucidation of the "sharing of the net benefits" method, see Order Modifying and Adopting Initial Decision of Presiding Examiner and Examiner's Further Decision Upon Reopened Hearing, *The Montana Power Co.*, Project No. 5, 25 F.P.C. 221 (1961), *rehearing denied* by order issued March 24, 1961, *affirmed, The Montana Power Co.* v. *FPC*, 298 F. 2d 335 (D.C. Cir. 1962). See also Order On Rehearing Fixing Annual Charges For Use of a Government Dam, *Alabama Power Co.*, Project No. 2165, 36 F.P.C. 659 (1966).

[3]See Order Issuing License (Major), *Public Service Company of Indiana, Inc.*, Project No. 2211, 25 F.P.C. 1065 (1961); Order Issuing License (Major), *Ohio Power Co.*, Project No. 2570, 50 F.P.C. 2020 (1973).

On the basis of the cost estimates cited above for the proposed Greenup Project and its least expensive alternative, the annual net benefits deriving from the Greenup Project, as developed by Vanceburg, would be valued at $455,800. With these benefits shared equally between the United States and Vanceburg, the annual charge for the use of the Greenup facility should thus be $227,900.

Our determination of the annual charges in this instance is tied closely to the net benefits attributable to operation of the Greenup Project by Vanceburg. Such benefits are derived largely from a comparison of cost estimates, including an estimate of the cost of construction and operation of the Greenup Project at a certain capacity. In view of the

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fact that such capacity, and the attendant benefits to Vanceburg, will be forthcoming by degrees with the construction of the generating units at the project, we find that the payment of annual charges by Vanceburg should be timed and graduated to correspond to the availability of such generating capacity. This approach to timing the assessment of annual charges is consistent, as a matter of policy, with those provisions of Section 11.24(g) of our Regulations[4] that confer upon municipal licensees an exemption from the payment of annual charges during the construction period," when the project is considered to be "operating without profit." In a similar sense, the Greenup Project could be said to be "operating without benefit," to the extent that potential capacity has not been realized, during the construction period. Hence, for the purposes of this project, the Government dam exception to the exemption provided to municipalities in Section 11.24(g) of the Regulations will be waived. Since the Greenup Project will have three generat-

[4]18 C.F.R. §11.24(g) (1975).

ing units of equal capacity, one-third of the total annual charge should be assessed with the effective date of commercial operation of each generating unit. These annual charges are provided for in Article 56 of this license.

On October 7, 1969, Ohio Power Company of Canton, Ohio, filed, and on January 16, 1970, supplemented, an application for preliminary permit for the proposed Greenup Project No. 2704 which would also be located at the Corps' Greenup Locks and Dam. This application for preliminary permit conflicts with Vanceburg's application for license. While Vanceburg was issued a preliminary permit for the Greenup Project No. 2614,[5] Vanceburg failed to file an application for license for this project before the expiration of its preliminary permit. Thus, pursuant to the provisions of Article 7 of its preliminary permit, Vanceburg lost its priority of application for license under Section 5[6] of the Act on September 30, 1969.

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While Vanceburg had no priority within the meaning of Section 5 of the Act, we need not decide the issue of whether Vanceburg is entitled to a preference within the meaning of Section 7(a)[7] of the Act. The plans submitted by Vanceburg are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, and Vanceburg has submitted satisfactory evidence of its ability to carry out these plans. The plans submitted by Ohio Power Company in its application for preliminary permit are *not* submitted for the purpose of developing or utilizing the water resources of the region. At most, Ohio Power Company seeks to study the development and

[5]*Ohio Power Company*, Project No. 2571, *Vanceburg Electric Light, Heat, and Power System, City of Vanceburg, Kentucky*, Project No. 2614, 38 F.P.C. 881 (1967).

[6]16 U.S.C. §798.

[7]*Id.* §800(a).

utilization of water resources in the vicinity of the Greenup Locks and Dam pursuant to a preliminary permit. We also note that Ohio Power Company, citing financial problems, has requested an extension of time to commence construction of the Racine Project No. 2570. Thus, while we are satisfied that both applicants can carry out the plans of their respective applications, apparently only Vanceburg would be in a position to construct the project if both applicants were applying for a license. In concluding that the application for preliminary permit filed by Ohio Power Company should be dismissed, we wish to emphasize that our procedural and substantive disposition of this aspect of the proceeding might be different if both Vanceburg and Ohio Power Company were applying for a license.

We now discuss the contentions advanced by Ohio Power Company and KIMPA. Ohio Power Company alleges that Vanceburg does not possess the power under Kentucky law to operate a project which will be located both in Kentucky and Ohio, and thus cannot comply with the requirements of Section 9(b)[8] of the Act. Specifically, Ohio Power Company contends that Vanceburg has failed to comply with the requirements of Section 9(b) of the Act with respect to the right to engage in the business of developing, transmitting, and distributing power within the State of Ohio.

Vanceburg is empowered under the applicable statutes of the State of Kentucky to operate power facilities both within and without its corporate limits.[9] The words

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"within or without" have been construed to embrace locations outside a State in a situation where a municipality sought to construct a municipal airport located partly in one State and partly in another State. *McLaughlin* v. *City*

[8] *Id.* §802(b).

[9] KY. REV. STAT. §96.520.

of Chattanooga, 180 Tenn. 638, 177 S. W. 2d 823 (1944). Based on the facts in that case and the statutory language construed, we believe that Vanceburg possesses the right to develop, transmit, and distribute power from a project located both in Kentucky and Ohio.

Even assuming *arguendo* that a Kentucky court would construe the pertinent Kentucky statutes as limiting a municipality's authority only to areas within the State of Kentucky,[10] the failure of Vanceburg to demonstrate its right to engage in the business of developing, transmitting, and distributing power within the State of Ohio would not preclude this Commission from issuing a license to Vanceburg. *First Iowa Hydroelectric Coop.* v. *FPC,* 328 U. S. 152 (1946). Limitations of State law cannot circumscribe the exercise of Commission authority under the Act. *Washington Public Power Supply System* v. *Pacific Northwest Power Co.,* 217 F. Supp. 481 (D. Ore. 1963). This principle is particularly applicable where, as here, only United States land will be utilized for project purposes in the State of Ohio. In light of the abovenoted discussion, we dismiss this allegation.

Ohio Power Company also alleges that EKRECC should be the applicant for license. While EKRECC will receive all power that is not needed by Vanceburg from both the Cannelton Project No. 2245 and this project, and while Vanceburg's load is small compared to the output expected from these projects, EKRECC has no right to receive any power from these projects. If Vanceburg is successful in its efforts to increase its load by attracting industry to the area, EKRECC may receive no power from these projects. Therefore, EKRECC's interest in these projects can best be described as contingent during the term of the license.

[10] The scope of a municipality's authority outside the State has not, to our knowledge, been addressed by Kentucky courts.

The contingent interest of EKRECC in this project is less substantial than the non-contingent interest of a municipality in storage rights at a reservoir. Yet, the abovenoted

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interest in storage rights was held not to be sufficient to justify requiring the municipality to be a joint applicant. *State of California* v. *FPC*, 345 F. 2d 917 (9th Cir. 1965). In this case, EKRECC will not be the legal owner of the project or any portion thereof; nor will EKRECC have a right to receive power from the project. Accordingly, we conclude that EKRECC should not be a joint applicant for license and dismiss this allegation.

Finally, Ohio Power Company alleges that Vanceburg has failed to establish satisfactorily its financial ability to construct and operate the project. Specifically, Ohio Power Company alleges that, while Vanceburg alludes to financial studies by three investment banking firms in its letter dated July 22, 1970, Vanceburg has only filed a letter of assurance from one investment banking firm. Subsequent to Ohio Power Company's filing, and by letter dated November 9, 1972, filed as part of Vanceburg's January 8, 1973, submittal relating to the projects' economic and financial feasibility, the investment banking firm of Conners & Co., Inc. indicated that the proposed securities to be issued by Vanceburg could be successfully marketed at a competitive interest rate assuming that the project was feasible from an economic standpoint and that necessary Federal and State approvals were obtained. This firm further noted that it has been a major factor in financing bonds in the State of Kentucky and Ohio, and offered to purchase these securities. A legal opinion accompanied this letter.

We believe the showing by Vanceburg in the abovenoted letter is sufficient to demonstrate the financial feasibility of the project. Furthermore, we find that Vanceburg's filing

on financial feasibility is in conformance with our Regulations, which require:

> *Exhibit G.* Statement showing the financial ability of the applicant to carry out the project applied for, together with a statement or explanation of the proposed method of financing the construction thereof. 18 C.F.R. §4.41 (1975).

Accordingly, we dismiss Ohio Power Company's allegation.

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We have also considered the allegations raised by KIMPA. KIMPA alleges that the marketing plan for power from these projects violates KIMPA's rights as a preference customer under the Act. The Act contains no preference for *purchasers* of power from a project. The Act does contain a preference for State and municipal *applicants* for certain types of authorization under the Act.[11] This provision is Section 7(a) of the Act. Congress has not, however, provided a preference in the Act for purchasers of power from a project.

In this context, KIMPA alleges that the interpretation KIMPA places on the Act is supported by Congressional policy enunciated in other Federal legislation.[12] The Congressional policy set forth in those statutes, enacted before the advent of rural electric cooperatives, was to provide a preference for municipal purchasers. After the advent of

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[11]See Order Issuing License (Major) for the Cannelton Project No. 2245 for a discussion of the scope of this preference.

[12]Flood Control Act of 1944, 16 U.S.C. §825s; Bonneville Project Act, 16 U.S.C. §832c; Reclamation Act of 1906, 43 U.S.C. §522; Reclamation Project Act of 1939, 43 U.S.C. §485h; Tennessee Valley Authority Act, 16 U.S.C. §831i; Niagara Redevelopment Act, 16 U.S.C. §836. Other statutes containing preference clauses are the Fort Peck Project Act, the Boulder Canyon Project Act, the Falcon Dam Act, the Salt River Reclamation Project Act, and the Eklutna Project Act.

cooperatives, the Congressional policy has been to provide preferences for both municipal and cooperative purchasers of power. With the exception of the Niagara Project Act,[13] a Congressional statute concerning a project in an international boundary stream and involving a Treaty with Canada, all other preference legislation concerns the marketing of power from Federally developed projects. The Congressional policy of preference legislation is to provide a preference for municipal and cooperative purchasers of power from Federal projects. We do not believe that the purposes of these Congressional statutes can be related to the purposes of a statute which concerns the development of hydroelectric power by non-Federal entities. *City of Chicago* v. *FPC*, 385 F. 2d 629 (D.C. Cir. 1967). Absent express Congressional legislation on the subject[14] and given the fact that the

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Act does not provide any preferences in the marketing of power from a licensed project, we find that the marketing plan for the project does not violate KIMPA's alleged rights as a preference customer under the Act.[15]

KIMPA further asserts that the marketing plan for power from the Cannelton Project No. 2245 and the Greenup Project No. 2614 violates thet Act and the antitrust laws of the United States. This marketing plan, as embodied in the Memorandum of Understanding between EKRECC and Vanceburg, provides, *inter alia*, for the interconnection of Vanceburg and EKRECC; the sale of all power from these projects, not needed by Vanceburg, to EKRECC in ex-

[13]16 U.S.C. §836.

[14]n. 12, *supra*.

[15]In light of our disposition of this issue, we do not reach the question of whether the public interest would be served by preferring a municipality over a cooperative in the marketing of power from a project.

change for emergency backup, economy, and firming energy; the coordination of maintenance and repair schedules for all generating facilities; and the compensation to be paid for services rendered. Initially, we note that the Memorandum of Understanding is an agreement which is not subject to Commission scrutiny under Part II of the Act. Municipalities are exempt from Part II of the Act by Section 201(f),[16] and a cooperative is not a "public utility" within the meaning of Section 201(e) of the Act.[17] Furthermore, in light of the fact that the State of Kentucky has expressly empowered a local commission and the State courts to regulate municipal rates and services,[18] we have no rates and services authority over Vanceburg under Section 19[19] of the Act. While

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Commission authority over the Memorandum of Understanding is limited under Both Part I and Part II of the Act, we have examined public interest aspects of this agreement, and the facts and circumstances which led EKRECC and Vanceburg to enter into the agreement, in our disposition of these applications.

When the Commission issued a preliminary permit to Vanceburg for the Greenup Project No. 2614, the Commission put Vanceburg on notice that it would have to demon-

[16]16 U.S.C. §824(f).

[17]Id. §824(e). *Salt River Project Agricultural Improvement and Power District* v. *FPC*, 391 F. 2d 470 (D.C. Cir. 1968), *cert. denied* 393 U. S. 857 (1968).

[18]The pertinent Kentucky statutes provide that the legislative body of the municipality shall, by ordinance, appoint a utility commission consisting of three members with authority over rates and services charged by the municipality. KY. REV. STAT. §96.530. The rates prescribed by this utility commission are subject to judicial scrutiny. *City of Mt. Vernon* v. *Banks*, 380 S. W. 2d 268 (Ky. 1964).

[19]16 U.S.C. §812.

strate a market for the power that would be generated.[20] Vanceburg was well aware of this problem. Before making application for the preliminary permit, Vanceburg had unsuccessfully attempted to convince all municipal electric systems in Kentucky, including two members of KIMPA, the Cities of Paris and Frankfort, to join with Vanceburg in applying for the preliminary permit. Subsequently, in order to demonstrate a market for the power from these projects, Vanceburg entered into the abovenoted agreement with EKRECC on February 18, 1970, as amended February 1, 1972. Thus, in 1971, when the Kentucky-Indiana Power Committee, the predecessor of KIMPA, was formed, Vanceburg had already entered into an agreement to sell all power in excess of Vanceburg's needs to EKRECC. It is in this undisputed factual context that we discuss KIMPA's allegations.

KIMPA alleges that the marketing plan proposed by Vanceburg is violative of the antitrust laws and the Act. The antitrust laws of the United States, and, in particular, Sections 1[21] and 2[22] of the Sherman Act, apply to combinations to restrain competition and attempts to monopolize on the part of *individuals* and *corporations*. The Sherman Act does not apply to restrain a State or activities undertaken pursuant to legislative mandate. *Parker* v. *Brown*, 317 U. S. 341 (1942). The decision by Vanceburg, a municipality and

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a creature of the State of Kentucky, to sell all power in excess of its needs to EKRECC, is immune from antitrust

[20]See Article 16 of Vanceburg's preliminary permit. *Ohio Power Company*, Project No. 2571, *Vanceburg Electric Light, Heat, and Power System, City of Vanceburg, Kentucky*, Project No. 2614, 38 F.P.C. 881 (1967).

[21]15 U.S.C. §1.

[22]*Id.* §2.

scrutiny under the Sherman Act. We, therefore, conclude that the marketing plan submitted by Vanceburg is not violative of the antitrust laws of the United States or Section 10(h)[23] of the Act, which follows closely the language of Section 1 of the Sherman Act.

Even assuming *arguendo* that the marketing plan for power from these projects, as embodied in the agreement between Vanceburg and EKRECC, is subject to antitrust scrutiny, there is nothing in the agreement, or the facts or circumstances surrounding the agreement, which is violative of the antitrust laws or Section 10(h) of the Act. Before entering into the agreement, Vanceburg did not refuse to deal with any prospective purchaser of power from these projects. In fact, Vanceburg actively solicited the aid of municipal systems in the State of Kentucky in pursuing their application. Only EKRECC, a cooperative, expressed an interest in the power from these projects surplus to Vanceburg's needs. No antitrust violations can be predicated on Vanceburg's actions prior to entering into the agreement with EKRECC. The antitrust laws were not meant to forbid or restrict normal and usual contracts entered into after a process whereby the power was offered for purchase to potentially interested parties.

But even assuming that, contrary to the fact, Vanceburg did refuse to deal with some party before entering into the agreement, this refusal by Vanceburg would not have been in violation of the antitrust laws. Absent restrictions on resale imposed by Vanceburg or other evidence of a purpose to create or maintain a monopoly, Vanceburg can deal with one possible purchaser of power and refuse to deal with another such purchaser without violating the Sherman Act. KIMPA has not alleged that Vanceburg has imposed

[23]16 U.S.C. §803(h).

restrictions on the resale by EKRECC of power from the project or otherwise attempted to create or maintain a monopoly.

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KIMPA also alleges that the mandatory resale provisions of the Kentucky Indiana Power Pool (KIP Pool)[24] require EKRECC to sell any power from these projects in excess of EKRECC's needs to other members of the KIP Pool. This provision, KIMPA contends, precludes KIMPA from obtaining any power from these projects and is anticompetitive and discriminatory. We discusss this contention bearing in mind our conclusion that the marketing plan for power from these projects, as embodied in the agreement, is consistent with the antitrust laws and Section 10(h) of the Act.

Insofar as KIMPA's objection may be construed as an objection to the agreement merely because a party to that agreement is involved in another agreement, the KIP Pool Agreement, which may be inconsistent with the antitrust laws, we believe this objection, based as it is on a "guilt by association" rationale, is insubstantial. The agreement between EKRECC and Vanceburg is valid. We see no reason to deny Vanceburg's applications because of the alleged antitrust implications of EKRECC's signature on another agreement. We conclude that the alleged anticompetitive activities of a potential purchaser (EKRECC) of power in other matters are not reasonably related to a decision on the potential seller's (Vanceburg) application for license and are otherwise insubstantial.

Insofar as KIMPA's allegation concerns the potential resale of power from these projects by EKRECC pursuant

[24]The KIP Pool is composed of Kentucky Utilities, Public Service Company of Indiana, Indianapolis Power and Light Company, and EKRECC.

to the provisions of the KIP Pool Agreement, we fail to see why this fact requires denial of Vanceburg's applications. This Commission has already determined that the questions of EKRECC's membership in the KIP Pool, and issues related to the KIP Pool Agreement, raises issues of sufficient import to require an evidentiary hearing.[25] If we should decide that

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the mandatory resale provisions of the KIP Pool Agreement are not in the public interest, we may issue an order in those consolidated proceedings which would allow KIMPA to purchase power from these projects, which is in excess of EKRECC's needs, from EKRECC. Thus, we can give no greater relief to KIMPA under Part I of the Act on this issue than under other Parts of the Act which govern matters relating to interconnections, pooling agreements, and rates. These consolidated proceedings are the appropriate and proper forum for the resolution of matters related to the KIP Pool. Furthermore, we reiterate that nothing we could order in this proceeding would afford KIMPA any greater relief on this issue than would be available in the abovenoted consolidated proceedings.

KIMPA alleges that Vanceburg is estopped from denying KIMPA participation in the marketing plan for power

[25]A new KIP Agreement was entered into in 1971 which provided for EKRECC's membership in the KIP Pool. The new KIP Agreement (Docket No. E-7669), an amendment to that agreement (Docket No. E-7937), and proposed charges in Service Schedule B of that agreement (Docket No. E-8053) were consolidated for evidentiary hearing. *Public Service Company of Indiana, Inc.*, Docket Nos. E-7669 and E-7937, *Kentucky Utilities Company*, Docket No. E-8053, 50 F.P.C. 307 (1973). Antitrust issues raised in these dockets have been further consolidated with similar issues raised in Docket No. E-7704 and Docket No. E-8331 which relate to the issuance by Kentucky Utilities Co. of securities and an increase by Kentucky Utilities Co. of its short-term borrowings, respectively, by order issued February 15, 1974.

produced at these projects because of oral assurances by Vanceburg and EKRECC that KIMPA would be included in the marketing plan. We have accepted KIMPA's allegation that Vanceburg and EKRECC have provided these oral assurances as true for purposes of decision.

Initially, we note that, if KIMPA truly believed that these oral assurances were sufficient to constitute an estoppel or to modify the written agreement between EKRECC and Vanceburg to allow KIMPA to participate in the marketing plan for power from these projects, this contention is inconsistent with KIMPA's efforts to cause Vanceburg and EKRECC to modify their agreement with a supplemental *written* agreement to which KIMPA would also be a signator. In any event, insofar as we may have authority to rule on this contention in this proceeding, we find that these oral assurances were insufficient to constitute an estoppl against Vanceburg and EKRECC or otherwise to modify the written agreement between

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Vanceburg and EKRECC. We wish to emphasize, however, that our determination should not be construed as foreclosing KIMPA from pursuing any remedies on this issue of contract law which it may have.

Finally, we have examined the two alternative marketing plans, submitted by KIMPA in its petition and rejected by Vanceburg and EKRECC, to determine whether the public interest would be served by these plans. We conclude that neither of these plans is a reasonable alternative to the marketing plan proposed by Vanceburg.

In our Order Issuing License (Major) for the Cannelton Project No. 2245, we discussed the alternative of allowing KIMPA to become the applicant for license for that project. We noted that KIMPA could have filed an application for license for that project. However, KIMPA has not chosen

to do so. We do not consider it reasonable to consider remote and speculative alternatives or alternatives which the party proposing them has not chosen to actively pursue through the legitimate and proper channels provided for that party under Part I of the Act. The Commission considers applications that are properly before it.

We have also examined the alternative KIMPA originally proposed for consideration by EKRECC and Vanceburg by letter dated November 9, 1973. Under the marketing plan Vanceburg would have a right to 25 mw, EKRECC 37.5 mw, and KIMPA 87.5 mw of the nameplate capacity of these two projects. During the first thirteen years of the license, however, EKRECC would receive more than 37.5 mw and KIMPA less than 87.5 mw.[26]

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The plan further specified that EKRECC would provide transmission service to both Vanceburg and KIMPA or their designated wheeling agent and that Vanceburg and KIMPA would finance any transmission facilities necessary to deliver power from these projects to EKRECC's transmission system. No rates are specified under the plan, nor is there any provision for other types of service.

This plan was proposed for the purpose of enabling the projects to be financed with tax-exempt securities. These securities, it was alleged, could thus be marketed at a lower rate, with the result that the principal interest on the

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[26]The plan specified that EKRECC would receive an additional 27.5 mw for the first five years which, after five years, would be "recovered" by KIMPA at the rate of 5 mw a year for seven years and 2½ mw in the eighth year. We note a discrepancy here and believe that the 27.5 mw figure is probably incorrect and should instead be 37.5 mw. For the purposes of our discussion of this plan, it is not, however, important to know the correct number. What is important is the fact that EKRECC would obtain more than 25 percent of the nameplate output of the projects during the term of the license.

capital cost of these projects would be reduced. KIMPA estimated that the difference in annual costs between financing these projects with taxable and tax-exempt securities would be in excess of $10 per kw.[27]. However, because EKRECC would

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receive more than 25 percent of the output of the facilities under the plan,[28] the bonds which Vanceburg and KIMPA would issue under the plan would qualify as Industrial Development Bonds under Section 103(c) of the Internal Revenue Code and regulations issued thereunder and, thus, would be taxable securities. Therefore, the one justification which KIMPA offers for the plan does not constitute an advantage over the marketing plan submitted by Vanceburg as set forth in the agreement between Vanceburg and EKRECC.

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[27]Vanceburg in its submittal of January 8, 1973, related to the projects' economic and financial feasibility, concluded that the bonds would be classified as Industrial Development Bonds under Section 103(c) of the Internal Revenue Code and regulations thereunder promulgated July 5, 1972, and published August 3, 1972 (37 Fed. Reg. 15485). 26 C.F.R. §1.103 *et seq.* (1975). Because EKRECC has no right to receive any power under the agreement between Vanceburg and EKRECC and, indeed, no megawatt figure is specified, the bonds may not qualify as Industrial Development Bonds. The regulations specify that more than 25 percent of the output of these projects, where output is determined by multiplying the nameplate capacity of the facility by the number of years in the contract term of the issue of obligations issued to provide such facility, must be used by non-exempt persons in order for the bonds to be classified as Industrial Development Bonds. 16 C.F.R. §1.103-7 (1975). If the bonds are not Industrial Development Bonds, under Section 103(c) of the Internal Revenue Code, then the interest on the bonds is tax-exempt under Section 103(a) of the Internal Revenue Code. In this order, however, it is unnecessary for purposes of decision to determine whether the securities to be issued by Vanceburg will be taxable or taxexempt. We have, therefore, assumed that these securities will be taxable.

[28]n. 26, *supra*.

We also note that KIMPA does not have the necessary transmission contracts with entities other than Vanceburg and EKRECC by which it could take and beneficially use its share of power under this plan or any plan that might be presented. The members of KIMPA are full or partial requirements customers of Kentucky Utilities Company, Public Service Company of Indiana, and Southern Indiana Gas and Electric Company,[29] Since neither Vanceburg nor EKRECC supply any of the members of KIMPA, we are not, therefore, presented with a situation where the actions of Vanceburg and EKRECC could raise potential antitrust issues with respect to KIMPA's failure to supply necessary transmission contracts. *Compare, Conway Corp.* v. *FPC*, 510 F. 2d 1264 (D.C. Cir. 1975), *cert. granted* 44 U.S.L.W. 3279 (1975).

Finally, KIMPA has not indicated how we could order entities other than Vanceburg, the only applicant for license,[30] to make power available to KIMPA in a manner consistent with our authority under the Act.[31] We, therefore, find, for the abovenoted reasons, that the marketing plans proposed by

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KIMPA, and indeed any marketing plans which include

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[29]The Cities of Paris and Frankfort purchase power from Kentucky Utilities Company. The Cities of Crawfordsville, Washington, and Tipton purchase power from Public Service Company of Indiana. The Cities of Jasper, Huntingburg, and Ferdinand purchase power from Southern Indiana Gas and Electric Company.

[30]We have heretofore discussed EKRECC's status in these proceedings under Part I of the Act.

[31]While this Commission has ordered wheeling over a project's primary lines under Part I of the Act, *FPC* v. *Idaho Power Company*, 344 U. S. 17 (1952), we have no authority to order wheeling of power under Part II of the Act. *City of Paris* v. *Kentucky Utilities*, 41 F.P.C. 45 (1969). We need not address in this proceeding the question of whether we could order wheeling over an applicant's non-primary lines in issuing a license to that applicant under Part I of the Act.

KIMPA, are not reasonable alternatives to the marketing plan proposed by Vanceburg for these projects.

Having considered the allegations raised by Ohio Power Company and KIMPA and concluded that these allegations are without merit, it is not necessary to consider the additional documents filed by KIMPA and Vanceburg subsequent to June 7, 1974.[32]

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Discussion of the matters raised in these documents would not enhance or affect in any manner our disposition of the issues addressed in this order.

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[32]The documents and the dates upon which they were filed are as follows: Protest of the Kentucky-Indiana Municipal Power Association to the Amended Application for License of Vanceburg, Kentucky, February 5, 1975; Vanceburg's Response to KIMPA's Protest to the Amended Application and Motion, February 24, 1975; Motion to Strike Vanceburg's Response to KIMPA's Protest to the Amended Application and Motion, February 28, 1975; Motion to Bifurcate Project Numbers 2245 & 2614 for Separate Consideration by the Commission and to Convene and Hold an Evidentiary Hearing to Determine the Relative Interests of the Parties in Each Proceeding Before a License Issues for Either Project, March 14, 1975; Motion of Vanceburg to Reject, March 26, 1975; Response of the Kentucky-Indiana Municipal Power Association to the Motion of Vanceburg to Reject, March 31, 1975; Response and Motion of Vanceburg to Motion of Kentucky-Indiana Municipal Power Association Motion to Bifurcate, April 7, 1975; Motion to Convene and Hold a Hearing to Determine Whether East Kentucky Rural Electric Cooperative Corporation is Entitled to a Preference Under Section 7(a) of the Federal Power Act, April 7, 1975; Vanceburg's Response to Motion of Kentucky-Indiana Municipal Power Association, April 21, 1975; KIMPA's Reply to Vanceburg's Response to Motion of Kentucky-Indiana Municipal Power Association, April 21, 1975; Notice and Application for Depositions and Application for Issuance of Subpoenas for Deposition and Production of Documentary Evidence, April 23, 1975; Vanceburg's Response to Kentucky-Indiana Municipal Power Association Notice and Application for Depositions, April 28, 1975; Motion of the Kentucky-Indiana Municipal Power Association to Set Procedural Dates for the Taking of Depositions, May 27, 1975; Vanceburg's Response to Kentucky-Indiana Municipal Power Association's Latest Motion for Taking Depositions, May 28, 1975.

We have heretofore discussed the expected environmental impacts of construction, operation, and maintenance of the project. Based on these impacts, we conclude that issuance of a license, subject to the terms and conditions hereinafter imposed, would not be a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C)[33] of the National Environmental Policy Act of 1969.

The Commission finds:

(1) The Greenup Project No. 2614 would affect lands of the United States, would be located on a navigable waterway of the United States, and would utilize the surplus water or water power from a Government dam.

(2) Applicant is a corporation organized under the laws of the State of Kentucky and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project.

(3) Public notice of the filing of the application was given on March 12, 1971, and December 4, 1974. A notice of intervention was filed by the Public Utilities Commission of Ohio. A timely petition to intervene, filed by the Ohio Power Company on May 20, 1971, was granted by Commission order issued April 21, 1972. A late petition to intervene, filed by the Kentucky-Indiana Power Association on June 7, 1974, was granted by Commission order issued December 4, 1974.

(4) For the reasons set forth in this Order Issuing License (Major) and Dismissing Application for Preliminary Permit and in the Order Issuing License (Major) for the Cannelton Project No. 2245, the allegations raised by Ohio Power Company and Kentucky-Indiana Municipal

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[33]42 U.S.C. §4332(2)(C).

Power Association (KIMPA) present no disputed facts or facts which have not been accepted as true for the purpose of decision. Therefore, an evidentiary hearing is neither warranted nor in the public interest.

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(5) East Kentucky Rural Electric Cooperative Corporation (EKRECC) should not be a joint applicant with Vanceburg for a license for this project.

(6) The Federal Power Act (Act) contains no preference for purchasers of power from a project.

(7) The marketing plan for power from this project and the Cannelton Project No. 2245 does not violate KIMPA's alleged rights as a preference customer under the Act.

(8) The marketing plan for power from this project and the Cannelton Project No. 2245 does not violate the antitrust laws of the United States or Section 10(h) of the Act.

(9) Vanceburg is not estopped from denying KIMPA participation in the marketing plan for power from this project and the Cannelton Project No. 2245.

(10) Neither alternative marketing plan proposed by KIMPA for power from this project and the Cannelton Project No. 2245, and indeed any marketing plan which would include KIMPA, is a reasonable alternative to the marketing plan proposed by Vanceburg.

(11) An application for preliminary permit for the Greenup Project No. 2704 was filed by Ohio Power Company. Public notice of this application was given on December 18, 1969. Notices of intervention were filed by the Public Utilities Commission of Ohio on February 24, 1970, and by Vanceburg on December 24, 1969.

(12) The plans filed by Vanceburg in its application are best adapted to develop, conserve, and utilize in the public interest the water resources of the region. Accordingly,

the abovenoted application for preliminary permit filed by Ohio Power Company should be dismissed.

(13) Vanceburg has submitted satisfactory evidence of its financial ability to construct, operate, and maintain the proposed project.

(14) Subject to the terms and conditions hereinafter imposed, the project does not adversely affect a Government dam, nor will the issuance of a license therefor, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States.

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(15) Subject to the terms and conditions hereinafter imposed, the project will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes.

(16) The estimated cost of developing the project compared to the estimated cost of developing suitable alternative sources of power is reasonable.

(17) The installed horsepower capacity of the project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is 94,100 horsepower, and the amount of annual charges based on such capacity to be paid under the license for the project for the cost of administration of Part I of the Act is reasonable.

(18) For the purpose of recompensing the United States for the use of the Government's Greenup Locks and Dam and appurtenant structures, the annual charge for such use is hereinafter authorized to be $227,900, which charge is reasonable, is based upon the "sharing of the

net benefits" method, and may be readjusted in the future pursuant to Section 10(e) of the Act.

(19) It is desirable to reserve for a later date a determination as to the amount of annual charges for the use, occupancy and enjoyment of lands of the United States.

(20) Subject to the terms and conditions hereinafter imposed, the plans of the structures affecting navigation have been approved by the Corps of Engineers.

(21) The term of the licensee hereinafter authorized is 50 years, which term is reasonable.

(22) The exhibits designated and described in Paragraph (B) below conform to the Commission's Rules and Regulations and should be approved as part of the license for the project to the extent indicated herein.

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The Commission orders:

(A) This license is hereby issued to the City of Vanceburg, Kentucky (hereinafter Licensee), under Section 4(e) of the Federal Power Act for a period of 50 years effective the first day of the month in which this license is issued for the construction, operation and maintenance of the Greenup Hydroelectric Project No. 2614 located on the Ohio River and affecting navigable waters of the United States, and utilizing surplus water or waterpower from and affecting the Greenup Locks and Dam of the United States and appurtenant lands acquired by the Corps of Engineers, subject to the terms and conditions of the Act which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) The Greenup Project consists of:

(i) all lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interests in such lands

necessary or appropriate for the purposes of the project, whether such lands or interests therein are owned or held by the applicant or by the United States; such project area and project boundary being more generally shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit	FPC Number	Title
J (Sheet 1)-K	2614-3	Map of Project Area
J (Sheet 2)	2614-13	Map of Project Area

approved only to the extent that they show the general location of the project.

(ii) project works to be located in the space available on the Ohio side of the river east of Gate Pier No. 10 including: (1) a short concrete intake canal approximately 65 feet long and 150 feet wide, connected to (2) a power plant intake structure which in turn connects to (3) a concrete powerhouse

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section about 185 feet long, 175 feet wide, and with a rooftop elevation of 517.0 feet, consisting of three parallel concrete conduits enclosing three horizontal-axis, bulb-type kaplan turbines each rated at 33,000 hp connected to three generators each rated at 24,000 kva with a .98 power factor; (4) a concrete tailrace canal approximately 100 feet long and 154 feet wide; (5) the generator leads; (6) the Greenup substation; (7) a single-circuit 138 kv transmission line extending from the power plant four miles to East Kentucky Rural Electric Cooperative Corporation's (EKRECC) Argentum Substation, then 28 miles to Licensee's Black Oak Substation, then 13 miles to EKRECC's Charters Substation, then 26 miles to EKRCC's Charleston

Bottoms Generating Station (Marysville); (8) recreational facilities consisting of fishing and observation platforms; and (9) appurtenant facilities—the location, nature and character of which are more specifically shown and described by the exhibits hereinbefore cited and by certain other exhibits which also form part of the application for license and which are designated and described as follows:

Exhibit L	FPC No.	Showing
1	2614-5	General Layout
2	2614-6	Powerhouse Plan View
3	2614-7	Transverse Section through Powerhouse
4	2614-8	Typical Section of Powerhouse

Exhibit M, consisting of nine typewritten pages, filed December 17, 1969, entitled "General Description of Mechanical, Electrical, and Transmission Equipment," except that portion of Exhibit M describing the 85-mile-long transmission line and facilities appurtenant thereto.

Exhibit R, consisting of two typewritten pages and one drawing titled "Recreational Use Plan," FPC No. 2614-10.

(iii) all of the structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project and located within the project area, and such other property as may be used or useful

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in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; together with all riparian or other rights, the

use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(C) This license is also subject to the terms and conditions set forth in Form L-6 (revised October, 1975) entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States," which terms and conditions, designated as Articles 1 through 37, are attached hereto and made a part hereof, except for Articles 7 and 20, which are hereby deleted for the purposes of this license, and subject to the following special conditions set forth herein as additional articles:

Article 38. The Licensee shall dispose of all temporary structures, unused timber, brush, refuse, or other unneeded material resulting from the clearing of lands or from the maintenance or alteration of the project works. Disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 39. The Licensee shall, during the construction and operation of the project, continue to consult and cooperate with the Fish and Wildlife Service of the U. S. Department of the Interior and other appropriate Federal, State, and local agencies for the protection and development of the natural resources and values of the project area.

Article 40. The Licensee shall, prior to commencement of construction, consult and cooperate with appropriate Federal, State, and local agencies to determine the extent of archaeological survey and salvage excavations, if any, that may be necessary prior to any

construction activities, and shall provide funds in a reasonable amount for any needed surveys or salvage excavations to be conducted.

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Article 41. The Licensee shall cooperate with appropriate State and local agencies in the identification of historical structures, if any, within the project area and, if necessary, shall cooperate in developing a plan for the protection or relocation of such structures.

Article 42. The Licensee shall, to the satisfaction of the Commission's authorized representative, install and operate such signs, lights, sirens or other devices below the powerhouse to warn the public of fluctuations in flow from the project, and shall install such signs, lights and other safety devices above the powerhouse intakes, as may be reasonably needed to protect the public in its recreational use of project lands and waters.

Article 43. The Licensee shall release and save and hold the Government harmless from any and all causes of action, suits-at-law or equity, or claims or demands, or from any liability of any nature whatsoever, for and on account of any property damage (including damages thereto of taking of real estate or interests therein by reason of the flooding and/or erosion of such property by impoundments and/or discharges for purposes other than operation and maintenance of the Greenup Locks and Dam project for navigation purposes), personal injury or death arising out of the construction, operation, and maintenance of the power project; and the Licensee shall release and save and hold the Government harmless from any and all causes of action, suits-at-law or in equity, or claims or

demands or from any liability of any nature whatsoever for and on account of any property damage, or personal injury, or death of any of the Licensee's employees, contractors, licensees, agents, permitees, or assignees during the time they are engaged in the construction, operation, and maintenance of the power project, and arising out of the construction, operation, and maintenance by the United States of the Greenup Locks and Dam project. In partial support of its obligations under this clause, Licensee shall defend or, at the option of the Government, shall reimburse the Government for all costs of defending all claims and suits-at-law or in equity instituted against the United States for any damage caused or alleged to have been caused by operation of the power

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project, or the operation of the Greenup Locks and Dam project, in aid of the power project, including payment to landowners for any inverse or physical taking of real estate or interest therein adjudged by any court of competent jurisdiction by verdict, decision, or agreement of parties, to have resulted from the operation of the power project or the operation of the Greenup Locks and Dam project in aid of such power project (including litigation in which the United States is not a defendant); and, on request of the United States, shall properly record in the land records of the appropriate county and State all such judgments of said courts, and shall procure and record any other evidence of such taking, and payment therefor, reasonably required by the United States, running to Licensee or to the United States, as determined appropriate by the United States, including takings adjudged as aforesaid by courts of competent jurisdiction and agree-

ments made between the Licensee and landowners in compromise or avoidance of litigation.

Article 44. The Licensee shall commence construction of the project, within two years from the effective date of the license, shall thereafter in good faith and with due diligence prosecute such construction, and shall complete construction of such project works within five years from the effective date of the license.

Article 45. The design and construction of all facilities that will be an integral part of the dam or that could affect the integrity of the navigation system, as well as facilities for public use and recreation, shall be subject to the review and approval of the District Engineer, Corps of Engineers, Huntington, West Virginia.

Article 46. The Licensee shall submit, in accordance with the Commission's rules and regulations, revised Exhibit L drawings showing final designs of the project works and a revised Exhibit M. Licensee shall not begin construction of any such project structures until the Commission has approved such exhibits.

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Article 47. The Licensee shall, prior to initiation of power operations, enter into an agreement with the District Engineer, Corps of Engineers, Huntington, West Virginia, specifying details of an operating plan to protect Federal interests, including limitations on fluctuations of pools in the Greenup reservoir and the downstream Captain Anthony Meldahl reservoir. This agreement shall be subject to review, upon the request of either party, on the basis of operating experience.

Article 48. In the event the Chief of Engineers shall deem it necessary for the protection of navigation and shall so notify the Commission, the Commission,

after notice and opportunity for hearing, may require the Licensee at no expense to the Federal Government, and within one year from said date of notification, to construct a deflecting pier or wall in the river below the dam to deflect the current caused by discharge from the power plant away from entrances to the locks. The Licensee shall maintain such facilities at its expense. The design, location, and time of construction of such deflecting pier or wall shall be subject to the approval of the Chief of Engineers.

Article 49. The Licensee shall reimburse the Government for all costs, including design and construction costs incurred by the Government for the specific and sole purpose of accommodating the Licensee's power installation. These costs will be in addition to the annual payments specified in paragraph (ii) of Article 56. Arrangements for payment shall be made with the Chief of Engineers, U. S. Department of the Army, at the time of commencement of construction of the project.

Article 50. The Licensee shall furnish designated Corps of Engineers operating personnel with proposed power operating schedules of the power plant, including information on operation of air vents, if pertinent, in advance of power plant operation and revisions thereof on reasonable notice.

Article 51. The Licensee shall have no claim against the United States arising from the effect of any changes made or not made in the pool levels at Greenup Locks and Dam or the downstream Anthony Meldahl locks and dam for navigation or other beneficial purposes.

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Article 52. The Licensee shall avoid or minimize any disturbance caused by construction, operation, and maintenance of the project works to the natural, scenic, historic, and recreational values of the area, blending project works with the natural view, and revegetating, stabilizing, and landscaping all construction areas. Within one year from the date of issuance of this license, the Licensee shall file with the Commission its detailed plan to avoid or minimize any disturbance to such values caused by construction, operation, and maintenance of the project works. The plan, including an architectural rendering of the major project features, shall be prepared after consultation with a professional land use planner and appropriate Federal, State, and local agencies; and shall give due consideration to the provisions of the Commission's Order No. 414, issued November 27, 1970. The Commission reserves the right, after notice and opportunity for hearing, to prescribe any changes in the plans that the public interest may warrant.

Article 53. Within one year after commencement of construction of the project and after consultation with the Corps of Engineers concerning the location of the proposed project boundary, the Licensee shall file a revised Exhibit F and for Commission approval, revised Exhibits J and K delineating the proposed project boundary and the amount of United States lands within said boundary. The Licensee shall acquire title in fee to all lands, other than lands of the United States and lands for transmission line rights-of-way, within the project boundary shown on the Exhibits J and K approved by the Commission pursuant to this article.

Article 54. The Licensee, following consultation with appropriate water quality agencies, shall install a continuously recording dissolved oxygen monitoring system during generation, and shall maintain records of the data obtained from the monitoring system and make them available to appropriate agencies upon request. The Licensee shall install facilities for the admission of air into the draft tubes and shall, during power generation periods, operate such facilities whenever the dissolved oxygen concentration in the project discharge declines below 5.0 mg/1.

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Article 55. The Licensee shall conduct studies in cooperation with the Kentucky Department of Fish and Wildlife Resources and the Ohio Department of Natural Resources to determine any effects the project will have on fishery resources and, within three years from the date of commencement of operation of the project, shall file for Commission approval a revised Exhibit S prepared in accordance with Section 4.41 of the Commission Regulations which shall include, *inter alia,* the conclusions of said studies and a summary of the operation of the air admission and dissolved oxygen monitoring systems in maintaining desired dissolved oxygen levels in the project discharge as required in Article 54 of this license.

Article 56. The Licensee shall pay to the United States the following annual charges:

(i) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable annual charge as determined by the Commission, in accordance with its regulations in effect from time to time, the authorized installed capacity for such purpose being 94,100 horsepower;

(ii) For the purpose of recompensing the United States for the utilization of the Government's Greenup Locks and Dam and appurtenant structures, $227,900, which charge may be readjusted in the future pursuant to the provisions of Section 10(e) of the Act, and which shall be assessed as follows: (a) $75,967, effective as of the date of commercial operation of the first generating unit; (b) $151,934, effective as of the date of commercial operation of the second generating unit; and (c) $227,900, effective as of the date of commercial operation of the third generating unit;

(iii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, an amount to be hereafter determined by the Commission.

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(D) The Exhibits designated and described in Paragraph (B) above are hereby approved to the extent indicated therein and made a part of the license.

(E) The application for preliminary permit filed by Ohio Power Company for the Greenup Project No. 2704 is hereby dismissed.

(F) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license it shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

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APPENDIX A

Computation of Net Power Benefits, Greenup Project No. 2614

1. Greenup Project No. 2614

Installed Capacity 70.56 MW	
Est. Average Annual Generation 300 GWh	
Est. Dependable Capacity 37.5 MW	
Estimated Capital Cost (1/75) $33,848,600	
Est. Power to be supplied to U. S. Government	
Energy — 0.617 GWh	
Capacity — 0.375 MW	
Estimated Annual Cost ($1,000)	
Fixed ($33,848.6) x 0.1126	3811.4
O & M A & G	146.0
FPC Annual Charge	5.6
Total	3963.0

2. Steam Electric Plant Alternative

(2-500 MW Units w. Cooling Towers)	
Estimated Capital Cost (1/75)	$/kW
Steam Plant	363.74
Transmission	49.70
Total	413.44
Estimated Annual Cost	
Fixed ($413.44) x 0.1181	48.83
O & M A & G	2.63
Fuel, fixed & inventory	4.72
Total	56.18
Estimated Variable Cost	7.91 mills/kWh

3. Estimated Annual Value

Capacity[1] (36,877-375) kW x $56.18/kW	=	$2,050,700
Energy (300,000-617) MWh x $7.91/MWh	=	$2,368,100
Total		$4,418,800

4. Estimated Net Power Benefits

$4,418,800 — $3,963,000 = $455,800

[1] $\frac{\text{Hydro adjustment}}{\text{dependable capacity}} \times \frac{\text{probability of meeting load-hydro}}{\text{probability of meeting load-steam}}$

$$37{,}500 \times \frac{0.87771}{0.89257} = 36{,}877$$

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Form L-6
(Revised October, 1975)

FEDERAL POWER COMMISSION

TERMS AND CONDITIONS OF LICENCE FOR UNCONSTRUCTED MAJOR PROJECT AFFECTING NAVIGABLE WATERS AND LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall became a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

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Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 4. The construction, operation, and maintenance of the project and any work incidental to additions or alterations shall be subject to the inspection and supervision

of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of the project and for any subsequent alterations to the project. Construction of the project works or any feature or alteration thereof shall not be initiated until the program of inspection for the project works or any such feature thereof has been approved by said representative. The Licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

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Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construc-

tion, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is transferred to a new licensee or to a non-power licensee under the provisions of Section 15 of said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or

project property created by the Licensee or created or incurred after the issuance of the license: *Provided,* That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

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Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Article 8. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the

supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribed.

Article 9. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

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Article 10. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power system and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 11. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such deter-

mination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

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Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in

the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 14. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be im-

posed by any other lawful authority for avoiding or elimnating inductive interference.

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Article 15. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance,

and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

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Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided,* That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The Licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir

area. Further, the Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Material may be dredged or excavated from, or placed as fill in, project lands and/or waters only in the prosecution of work specifically authorized under the license; in the maintenance of the project; or after obtaining Commission approval, as appropriate. Any such material shall be removed and/or deposited in such manner as to reasonably preserve the environmental values of the

project and so as not to interfere with traffic on land or water. Dredging and filling in a navigable water of the United States shall also be done to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 22. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and rights-of-way and such rights of passage through its dams or other structures, and shall permit such control of its pools, as may

be required to complete and maintain such navigation facilities.

Article 23. The operation of any navigation facilities which may be constructed as a part of, or in connection with, any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army.

Article 24. The Licensee shall furnish power free of cost to the United States for the operation and maintenance of navigation facilities in the vicinity of the project at the voltage and frequency required by such facilities and at a point adjacent thereto, whether said facilities are constructed by the Licensee or by the United States.

Article 25. The Licensee shall construct, maintain, and operate at its own expense such lights and other signals for the protection of navigation as may be directed by the Secretary of the Department in which the Coast Guard is operating.

Article 26. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided,* That timber

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so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 27. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 28. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 29. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands,

or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

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Article 30. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 31. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 32. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or

maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 33. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the trans-

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mission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 34. The Licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. sec. 601, *et seq.*), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof: *Provided,* That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the Licensee for the purposes of the license: *Provided further,* That in the event of disagreement, any question of unreasonable inter-

ference shall be determined by the Commission after notice and opportunity for hearing.

Article 35. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

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Article 36. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and

regulations, or an annual license under the terms and conditions of this license.

Article 37. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

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In Testimony of its acknowledgment of acceptance of all of the provisions, terms and conditions of this license, City of Vanceburg, Kentucky, on this __ day of _____, 1976, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate seal to be affixed hereto and attested by _____, its _____ Secretary, pursuant to a resolution of its Board of Directors duly adopted on the ____ day of _____, 19 ___, a certified copy of the record of which is attached hereto.

By_____
President

Attest:

_____
Secretary

(Executed in quadruplicate)

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

City of Vanceburg, Kentucky } Project No. 2614

PETITION FOR REHEARING OF THE CITY OF VANCEBURG, KENTUCKY

The City of Vanceburg, pursuant to § 313(a) and (c) of the Federal Power Act, and § 1.34 of the Commission's Rules of Practice and Procedure, hereby petitions rehearing in the above captioned matter and moves the Commission to make final its order issuing a license to Vanceburg, said order being dated March 29, 1976. Vanceburg further states as follows:

1. Said order in Article 56 (p. 38) requires Petitioner to pay to the United States certain annual charges. Petitioner states that said charges are not proper for the reason that Vanceburg is a municipal corporation of the Commonwealth of Kentucky and the Vanceburg Electric Light Heat and Power System is a corporate entity totally owned by the city pursuant to § 96.520 of the Kentucky Revised Statutes. As such it is a public non-profit body.

2. Vanceburg has an agreement with East Kentucky Power Cooperative (East Kentucky) for certain transmission service and firming up of power and sale of excess power out of said project to East Kentucky. East Kentucky is a generation and transmission cooperative all of whose eighteen members are distribution electric cooperatives in the Commonwealth of Kentucky, organized under Chapter 279 of the Kentucky Revised Statutes. East Ken-

tucky and all of its members are non-profit cooperatives and are exempt from Federal income tax under § 501(c)(12) of the Internal Revenue Code of 1954 as amended.

3. Appendix A of the order is further in error because it does not include consideration of the amount of power Vanceburg Electric Light Heat and Power System provides at no cost to the

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municipality of Vanceburg.

WHEREFORE Vanceburg prays:

1. The Commission grant rehearing in the matter herein for the reasons above stated, and
2. Moves the Commission to make final its order granting license herein to Vanceburg.

Respectfully submitted,

(s) Philip P. Ardery
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202

(s) Marlow W. Cook
Shook, Hardy & Bacon
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for City of Vanceburg

April 27, 1976

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

CITY OF VANCEBURG, KENTUCKY } Project No. 2614

MOTION OF THE CITY OF VANCEBURG, KENTUCKY TO SUPPLEMENT ITS PETITION FOR REHEARING

The City of Vanceburg, Kentucky (Vanceburg) hereby moves the Commission to consider the following items as a supplement to its Petition for Rehearing, heretofore filed, and further states:

1. Vanceburg, pursuant to § 313(a) and (c) of the Federal Power Act, and § 1.34 of the Commission's Rules of Practice and Procedure, filed on April 27, 1976 a timely Petition for Rehearing in the above captioned matter.

2. The Commission's Order Issuing License (Major) and Dismissing Application for Preliminary Permit in this matter was issued on March 29, 1976. Vanceburg's consulting engineers, W. M. Lewis & Associates, Inc., of Portsmouth, Ohio, and Sogreah of Grenoble, France, made every effort to thoroughly review the technical details of the Order prior to the deadline for filing for rehearing but, due to principals of Lewis & Associates being involved in several matters before various state regulatory commissions and the inherent delay in exchange of correspondence with Grenoble, France, the engineers were unable to make a complete analysis of the Order prior to the filing for Rehearing on April 27.

3. After analysis of the Commission's Order by Vanceburg's consulting engineers, it appears appropriate and pertinent to the Commission's consideration that additional

facts regarding Article 56 of the Order (page 38)—and particularly Appendix A which was attached to and made part of the Order—be presented.

4. Vanceburg is a municipal corporation of the Commonwealth of Kentucky and the Vanceburg Electric Light, Heat and Power System is a corporate entity totally owned by the City pursuant to § 96.520 of the Kentucky Revised Statutes. As such, neither Vanceburg nor Vanceburg Electric Light, Heat and Power System pays Federal or state income tax as does an investor-owned electric utility.

5. The construction of Appendix A properly did not consider income taxes. If it had, as would have been required if Applicant was an investor-owned utility, the factor of 0.1126 in item 1 of Appendix A may well have been 0.1326, assuming an amount of 2 percent for the effect of income taxes. Assuming this same premise, the factor of 0.1181 in item 2 of Appendix A would have been 0.1381. Using these factors, the estimated net power benefits in item 4 of Appendix A would have been

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$80,800 instead of $455,800. To illustrate this, a sample calculation is attached hereto. Thus, the annual charge in Article 56(ii) for the purpose of recompensing the United States for the utilization of the Government's Greenup Locks and Dam and appurtenant structures would be $40,400.

6. Without giving consideration to the above, Vanceburg loses its advantage of being a municipality and owning and operating a municipal electric system for the benefit of its citizens.

7. Vanceburg filed as part of its Application for License an Economic Study wherein computations similar to those in Appendix A were provided. In this Study, Vanceburg delineated the individual items making up the annual

costs which the Commission in Appendix A to its Order establishes as 11.26 percent for hydro and 11.81 percent for steam. Since these are different than the factors used by Vanceburg, it will be extremely helpful to Vanceburg's consulting engineers to know the breakdown of these percentages and therefore requests the Commission to make them available.

WHEREFORE, Vanceburg prays that the Commission sustain this Motion to add the foregoing facts as a supplement to Vanceburg's Petition for Rehearing and further prays that:

1. The Commission recalculate Appendix A of its Order, giving Vanceburg full advantage of its municipality status.

2. Article 56(ii) of Part (C) of the Commission's Order be modified to reflect the recalculated Estimated Net Power Benefits of Appendix A.

3. The calculations used by the Commission in Appendix A be made available to Vanceburg.

Respectfully submitted,

(s) Philip P. Ardery
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202

(s) Marlow W. Cook
Shook, Hardy & Bacon
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for City of Vanceburg

May 14, 1976

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EXAMPLE OF CALCULATION TO ILLUSTRATE EFFECT OF INCOME TAXES ON NET POWER BENEFITS

Computation of Net Power Benefits, Greenup Project No. 2614

	Appendix A to Order		Calculation Using 2% Annual Cost to Represent Effect of Income Taxes
1. **Greenup Project No. 2614**			
Installed Capacity 70.56 MW			
Est. Average Annual Generation 300 GWh			
Est. Dependable Capacity 37.5 MW			
Estimated Capital Cost (1/75) $33,848,600			
Est. Power to be supplied U. S. Government			
Energy — 0.617 GWh			
Capacity — 0.375 MW			
Estimated Annual Cost ($1,000)			
Fixed ($33,848.6) x 0.1126	3811.4	x 0.1326	4488.3
O & M A & G	146.0		146.0
FPC Annual Charge	5.6		5.6
Total	3963.0		4639.9
2. Steam Electric Plant Alternative			
(2-500 MW Units w. Cooling Towers)			
Estimated Capital Cost (1/75)	$/KW		
Steam Plant	393.74		
Transmission	49.70		
Total	413.44		
Estimated Annual Cost			
Fixed ($413.44) x 0.1181	48.83	x 0.1381	57.10
O & M A & G	2.63		2.63
Fuel, fixed & inventory	4.72		4.72
Total	56.18		64.45
Estimated Variable Cost	7.91 mills/kwh		
3. Estimated Annual Value			
Capacity[1] (36,877-375) kw x $56.18/kw	= $2,050,700	x $64.45	= $2,352,600
Energy (300,000-617) mwh x $7.91/mwh	= $2,368,100		= $2,368,100
Total	$4,418,800		$4,720,700
4. Estimated Net Power Benefits			
$4,418,800 — $3,963 = $455,800			
$4,720,700 — $4,639,900 = $ 80,800			

[1] $\frac{\text{Hydro adjustment}}{\text{dependable capacity}} \times \frac{\text{probability of meeting load-hydro}}{\text{probability of meeting load-steam}}$

$$37{,}500 \times \frac{0.87771}{0.89257} = 36{,}877$$

[111]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, *Chairman;* Don S. Smith, John H. Holloman III, and James G. Watt.

City of Vanceburg, Kentucky } Rehearing Project No. 2614

ORDER GRANTING REHEARING FOR THE PURPOSE OF FURTHER CONSIDERATION

(Issued May 27, 1976)

On April 27, 1976, the City of Vanceburg, Kentucky (Vanceburg) filed a timely petition for rehearing of our Order of March 29, 1976, in which we issued a license to Vanceburg to construct, operate, and maintain the Greenup Project No. 2614. On May 14, 1976, Vanceburg filed a document entitled "Motion of the City of Vanceburg, Kentucky to Supplement its Petition for Rehearing."

The Commission finds:

It is appropriate and in the public interest to grant rehearing for the purpose of further consideration in connection with the above noted documents filed by Vanceburg.

The Commission orders:

Rehearing is hereby granted for the purpose of further consideration in connection with the above noted documents filed by Vanceburg.

By the Commission.

(Seal)

Kenneth F. Plumb,
Secretary

[112]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

REHEARING

Before Commissioners: RICHARD L. DUNHAM, *Chairman;* DON S. SMITH, JOHN H. HOLLOMAN III, and JAMES G. WATT.

CITY OF VANCEBURG, KENTUCKY } Project No. 2614

ORDER ON REHEARING

(Issued June 21, 1976)

On April 27, 1976, the City of Vanceburg, Kentucky (Vanceburg) filed a timely petition for rehearing of our March 29, 1976, Order Issuing License (Major) and Dismissing Application for Preliminary Permit for the Greenup Projects Nos. 2614 and 2704. On May 14, 1976, Vanceburg filed a document entitled "Motion of the City of Vanceburg, Kentucky to Supplement its Petition for Rehearings". By order issued May 27, 1976, we granted rehearing for the purpose of further consideration in connection with these documents. These documents do not present any arguments in addition to those arguments which are set forth in the documents filed on April 27 and May 14, 1976, for the Cannelton Project No. 2245.

The Commission finds:

For the reasons set forth in our Order Denying Rehearing for the Cannelton Project No. 2245, the documents filed by the City of Vanceburg, Kentucky, present no facts or legal arguments that require any change in or modification

of our order of March 29, 1976, issuing a license for Project No. 2614.

The Commission orders:

The documents filed by the City of Vanceburg, Kentucky, on April 27 and May 14, 1976, are hereby denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

[113]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

REHEARING

Before Commissioners:

CITY OF VANCEBURG, KENTUCKY } Projects No. 2245, 2614

ORDER SUPPLEMENTING ORDERS ON REHEARING

(Issued August 3, 1976)

On June 21, 1976, we issued separate Orders on Rehearing for the Cannelton Project No. 2245 and the Greenup Project No. 2614. It has come to our attention that these orders did not set out the individual items making up the 11.26 percent fixed cost figure (.1126) for the projects and the 11.81 percent fixed cost figure (.1181) for the steam plant alternative to the projects which were used in Appendix A of our March 29, 1976, orders in these proceedings. The City of Vanceburg, Kentucky (Vanceburg) requested this material in its May 14, 1976, Motion to Supplement Its Petition for Rehearing.

The Commission finds:

It is appropriate and in the public interest to provide the material requested by Vanceburg in its May 14, 1976, motion by supplementing our June 21, 1976, orders on rehearing.

The Commission orders:

The orders on rehearing of June 21, 1976, for these projects are hereby supplemented with the material set forth in Appendix A of this order.

By the Commission.

(SEAL)

Kenneth F. Plumb.
Secretary.

Order Supplementing Orders on Rehearing

[114]

APPENDIX A

Fixed Charge Rates Used in Computation of Annual Charges for Use of Government Dam
Projects Nos. 2245 & 2614

	Hydro. Project	Steam Plant Alternatives
Cost of Money	10.80%	10.80%
Amortization	0.06[1]	.31[1]
Interim Replacements	0.20	.35
Insurance	0.10	.25
State & Local Taxes	—	—
Federal Income Tax	—	—
Misc. Tax	0.10	0.10
Total Fixed Charge Rate	11.26%	11.81%

[1]Based on 50 years for hydro and 35 years for Steam Plant.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 76-1755
(and Consolidated Case No. 76-1756)

CITY OF VANCEBURG, KENTUCKY - - - *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION - *Respondent*

BEFORE: Bazelon, Chief Judge; Tamm and Wilkey, Circuit Judges.

ORDER DENYING REHEARING—Filed December 22, 1977

Upon consideration of the petition for rehearing filed by petitioner City of Vanceburg, Kentucky, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam
For the Court:
(s) GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 76-1755
(and Consolidated Case No. 76-1756)

CITY OF VANCEBURG, KENTUCKY - - - *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION - *Respondent*

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER DENYING SUGGESTION FOR REHEARING *EN BANC*—Filed December 22, 1977

The suggestion for rehearing *en banc* filed by petitioner City of Vanceburg, Kentucky, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that petitioner's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:
(s) GEORGE A. FISHER
Clerk

No. 77-1332

In the Supreme Court of the United States

OCTOBER TERM, 1977

CITY OF VANCEBURG, KENTUCKY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ROBERT R. NORDHAUS,
General Counsel,

HOWARD E. SHAPIRO,
Solicitor,

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Attorney,
Federal Energy Regulatory Commission,
Washington, D.C. 20426.

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-51) is unreported. Two of the four orders of the Federal Power Commission are reported at 55 F.P.C. 1432 and 1460. The other orders of the Commission (Pet. Supp. App. 55-65, 138-139) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17)[1] was entered on November 28, 1977, and its orders denying a petition for rehearing and suggestion for rehearing *en*

[1]"Pet. App." refers to the Appendix to the Petition; "Pet. Supp. App." refers to the separately bound Supplemental Appendix to the Petition.

banc were entered on December 22, 1977 (Pet. Supp. App. 142, 143). The petition for a writ of certiorari was filed on March 21, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

STATUTES INVOLVED

Sections 4(e), 7(a), 10(a), and 10(e) of the Federal Power Act, 41 Stat. 1065, 1067, 1068, 1069, as amended, 16 U.S.C. 797(e), 800(a), 803(a), and 803(e), are set forth in Appendix II to the petition. Section 313(b) of the Act, as added, 49 Stat. 860, and amended, 16 U.S.C. 825*l*(b), is set forth in an Appendix, *infra*, pp. 1a-2a.

QUESTION PRESENTED

Whether the Federal Power Commission, in determining a tax-exempt municipality's annual charges under Section 10(e) of the Federal Power Act for its use of a federal dam to generate hydroelectric power, was required to take into account, as reducing the benefits accruing to the municipality from use of the dam, the hypothetical tax costs a private utility would incur from such use.

STATEMENT

Section 10(e) of the Federal Power Act, 16 U.S.C. 803(e), provides that licenses issued for the construction and operation of electric generating and transmission facilities utilizing the surplus water or water power from a government dam are subject to the requirement that the licensee pay reasonable annual charges in an amount to be fixed by the Commission. Among these are "annual charges * * * assessed to compensate the United States for the use of Government

dams or other structures owned by the United States * * *" (Pet. App. 23).[2] These assessments are known as "dam-use" charges (*ibid.*).

By orders issued on March 29, 1976, the Federal Power Commission granted licenses, pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), to the City of Vanceburg, Kentucky, authorizing it to construct, operate, and maintain hydroelectric facilities at two government dams on the Ohio River (Pet. Supp. App. 1, 52). As required by Section 10(e) of the Act, the Commission assessed annual charges for Vanceburg's use of the government dams.[3] The Commission calculated the amount of annual charges for each project by the "sharing of net benefits" method, a formulation commonly used by the Commission. See *Alabama Power Co.*, 36 F.P.C. 659, 660; *Montana Power Company*, 25 F.P.C. 221, affirmed, *Montana Power Co.* v. *Federal Power Commission*, 298 F. 2d 335 (C.A. D.C.). That method involves four steps, as described by the court of appeals (Pet. App. 24):

> First, the licensee's annual cost of operating the proposed hydroelectric project is determined. Second, the annual cost of operating the least expensive (fossil fuel) alternative for producing equivalent energy is estimated. Third, the net benefit accruing to the licensee from use of the Government dam is computed by subtracting the former cost from the

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[2]The statutory language is: "reasonable annual charges in an amount to be fixed by the commission for the purpose of * * * recompensing [the United States] for the use, occupancy, and enjoyment of its lands or other property; * * *."

[3]The Commission also assessed, pursuant to Section 10(e), annual charges to reimburse the United States for the costs of administering Part I of the Federal Power Act and for the use of lands of the United States (Pet. App. 27). Neither of these charges is at issue in this case.

latter. Fourth, the licensee is assessed as an annual fee an amount equal to one-half of the difference between the former and the latter cost, thereby sharing equally between the United States and the licensee the net annual benefit resulting from use of the Government dam.

Applying this method, the Commission found that the annual cost to Vanceburg of each of the two projects was less than the annual cost of equivalent fossil fuel facilities and, assessing Vanceburg one-half of the annual differences in cost, arrived at annual charges of $243,700 and $277,900 for the two projects (Pet. App. 29-30).

Vanceburg petitioned for review of the Commission's orders on the ground that these annual charges were based in part on the tax savings that Vanceburg enjoyed as a tax-exempt municipality.[4] Because Vanceburg would pay no state or federal taxes, the Commission, in computing the net benefits to Vanceburg from the use of the projects, did not include any income tax costs when it compared the annual costs of operating the hydroelectric projects with the annual costs of operating the fossil fuel alternatives. Vanceburg pointed out that an investor-owned utility would incur income tax costs in operating both the hydroelectric projects and the fossil fuel alternatives, and that the differential between the annual costs of the hydroelectric projects and the fossil fuel

[4]Vanceburg also attempted to challenge the Commission's application of the sharing-of-benefits formula in other respects (Pet. App. 37). That challenge had not been raised before the Commission and the court of appeals held (Pet. App. 37-38), under Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), that it could not be raised for the first time on review (see *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498). Vanceburg has not challenged that ruling in its petition.

alternatives would be substantially lessened if income tax costs were included.[5] Recomputing the dam-use charges by the sharing-of-net benefits method with the income tax costs included, Vanceburg accordingly arrived at significantly lower annual charges (Pet. App. 31-35).

Vanceburg challenged the Commission's failure to include in its computation the income tax costs that would have been incurred by a non-exempt private utility, and the consequent assessment against Vanceburg of higher dam-use charges than would have been assessed against a private utility constructing and operating the same hydroelectric projects. Vanceburg contended that the higher "net benefits" achieved in its case by excluding tax costs did not represent cost savings accruing to Vanceburg from the use of the government dams, but mainly represented tax savings conferred on Vanceburg by virtue of its tax-exempt status under federal and state law. The charges assessed by the Commission were thus claimed to deprive Vanceburg of the advantage of being a tax-exempt municipality and to constitute, in effect, an invalid tax on the city (Pet. App. 30-31). Vanceburg also argued that the charges were invalid under the Federal Power Act because they discriminated against municipalities and, thereby, frustrated the purpose of the Act by deterring the development of hydroelectric projects by municipalities (Pet. App. 37, 50-51).

The court of appeals unanimously affirmed the Commission's orders (Pet. App. 17-51). On the basis of the language and the legislative history of Section 10(e) of the Federal Power Act, the court held that "the dam-use charges assessed thereunder are 'fees' and not 'taxes'; *that the Commission is authorized to base such fees on the*

[5]This is because the taxes incurred by hydroelectric projects are apparently greater than those incurred by fossil fuel plants. See Pet. App. 32-33, n. 26.

actual value of the benefit bestowed on the specific licensee; and that, in measuring the actual value of such benefit, *the Commission may consider real costs, including real tax costs*" (Pet. App. 39; emphasis by the court). The court further held that the Commission's approach was reasonable and therefore entitled to great weight, and that it did not frustrate the policies of the Internal Revenue Code exempting municipalities from income taxes (Pet. App. 47-49). Finally, the court held that Vanceburg had not met its burden of demonstrating that the Commission's assessment of annual charges on the basis of actual costs was discriminatory or otherwise inconsistent with the Federal Power Act (Pet. App. 50-51).

ARGUMENT

The court of appeals correctly held that the dam-use charges in this case were properly determined "fees," and not "taxes." Contrary to petitioner's contention (Pet. 7), the case therefore presents no issue concerning the constitutional immunity of municipalities from federal taxation. Petitioner's further claim that the Commission's decision imposes unreasonably high fees on it was correctly rejected by the court of appeals on the ground that the Commission properly exercised its discretion in basing the dam-use charges on actual benefits resulting to the licensee. There is no conflict among the circuits on any issue presented here, no indication that any issue is recurring or of general importance, and no reason for further review by this Court.

1. Petitioner errs in contending (Pet. 7-13) that in determining its annual dam-use charges, the Commission has levied an unconstitutional tax rather than a compensatory fee. The distinction between taxes and fees drawn by the court of appeals (Pet. App. 39-42) was

directly, and properly, derived from this Court's decisions in *National Cable Television Association* v. *United States*, 415 U.S. 336, and *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345. In *National Cable*, as noted by the court of appeals (Pet. App. 41), this Court stated (415 U.S. at 340-41):

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. * * * A "fee" connotes a "benefit" * * *. [Footnote omitted.]

Measured by this standard, the Commission's dam-use charges in this case are permissible fees. The charges were calculated directly from the benefits bestowed on Vanceburg by the licenses permitting it to utilize government dams. Those benefits are represented by the cost savings resulting from Vanceburg's use of federal dams to generate hydroelectric power, as compared with use of fossil fuel alternatives. As the court of appeals explained (Pet. App. 41-42), the annual charges are "exacted against a licensee in exchange for a privilege which the licensee has requested or applied for and from which the licensee derives a special benefit." The court's conclusion is amply supported by the legislative history of Section 10(e) of the Act, which is extensively set forth in the court's opinion (Pet. App. 42-46).

The court of appeals was also correct in upholding the Commission's determination of the actual benefit conferred on Vanceburg by use of the dams. Vanceburg is exempt from state and federal taxation whether it uses a federal dam or constructs a steam-powered generating plant. It was reasonable for the Commission to determine the cost differential between the two alternatives on the basis of the actual costs each would involve—costs that, for a municipality such as Vanceburg, would not include income taxes.

Petitioner's approach would have required the Commission to determine the net benefits to Vanceburg by computing the cost differential that would have been experienced by an imaginary private utility. Nothing in Section 10(e), its legislative history, or its prior administration requires that the hypothetical taxes an investor-owned utility would pay be taken into account as reducing the actual cost-saving to a municipality (Pet. App. 46-49). The Commission's determination that dam-use charges should be based on actual cost-savings reflects its prior precedent,[6] is reasonable, and is therefore entitled to considerable weight. *Udall* v. *Tallman*, 380 U.S. 1, 16. As the court of appeals stated (Pet. App. 47):

> The Commission's interpretation that Section 10(e) authorizes dam-use charges based on the actual value of dam use to the specific licensee is a reasonable one, and as such is entitled to great weight. We find nothing in the Act which militates against this construction. Moreover, we believe that this interpretation is most consistent with the notion of compensation in that each licensee is to be charged in

[6]The sharing-of-net-benefits formula requiring use of actual benefit to the licensee was discussed in *Alabama Power Co.*, 36 F.P.C. 659, 660.

> direct proportion to the fiscal benefit it actually receives. When Congress has failed to provide a formula for the Commission to follow, a court is not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation. Therefore, we conclude that a proper basis for dam use charges under Section 10(e) is the actual value of dam use to the specific licensee.

See also Pet. App. 49.

2. Vanceburg contends (Pet. 13-14) that the dam-use charges assessed here are unreasonable because they are "more than two and one-half times as great as any other dam-use charge ever assessed by the Commission." That argument is without merit. First, as observed by the court of appeals (Pet. App. 51), if Vanceburg's annual charges are higher than those incurred by other licenses, the reason is that the benefit conferred on Vanceburg by its licenses is correspondingly higher. Second, the comparison invited by Vanceburg (Pet. App. 56) fails to take into consideration differences in installed capacity at other projects, the effects of inflation,[7] or the dramatic increase in the prices of fossil fuels since 1973.[8] Third,

[7]If the annual cost of a hydroelectric facility in a given year was $90,000 and the cost of a steam-electric alternative was $100,000, the benefit of licensing the former would be $10,000. Assuming an annual inflation rate of 10%, the respective figures for the next year for the same project would be $99,000 and $110,000, with a benefit of $11,000. Thus, comparisons with projects for which licenses were issued many years ago (*e.g.*, Louisville Gas & Electric Co., Project No. 289, Federal Power Commission Sixth Annual Report 49, 240 (1926), cited by Vanceburg, Pet. App. 56) are misleading.

[8]Higher prices for fossil fuels have increased the annual costs for steam-electric plants and thus increased the benefit of licensing hydroelectric projects.

Vanceburg's claim that the charges are unreasonably high is—as its petition indicates (Pet. 14)—a reformulation of its contention that it has been unconstitutionally denied its tax immunity.

3. The Commission's method of computing dam-use charges is not, as petitioner claims (Pet. 14-15), inconsistent with the preference for municipal licensees established by Section 7(a) of the Federal Power Act, 16 U.S.C. 800(a).[9] The Commission applied Section 7(a) in granting Vanceburg a preference for a preliminary permit for one of the projects licensed here. *Ohio Power Co.*, 38 F.P.C. 881. But Section 10(e) of the Act does not establish a preference favoring municipal over other licensees in the determination of annual dam-use charges. Although Congress provided in Section 10(e) that licenses issued to municipalities "shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used * * * [for] municipal purposes," it stipulated that "in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission." 16 U.S.C. 803(e).

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[9]Section 7(a) provides:

> In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicants, the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

Vanceburg's further contention (Pet. 15) that the Commission's calculations have produced charges "too onerous to justify seeking a preliminary permit or license" was not substantiated in the record. The court of appeals therefore correctly held (Pet. App. 51):

> * * * Vanceburg has not provided any support for its contention that the assessed charges deter municipalities from developing water power; nor do we see how this deterrent effect could exist. Under the sharing-of-net-benefits formula only one half of the cost savings resulting from the hydroelectric option would be assessed as charges. This means that there are still substantial cost advantages in pursuing that option, cost advantages equivalent to the charges themselves.

4. The court of appeals rejected a number of claims raised by Vanceburg because they had not been presented to the Commission on rehearing and therefore, under Section 313(b), 16 U.S.C. 825*l*(b), could not be considered by the court. Pet. App. 37-38; see p. 4, n. 4, *supra*; *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492, 498. Similarly, Vanceburg's argument (Pet. 15-16) that the Commission's orders create an anticompetitive price squeeze under *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271, is foreclosed because it was not raised in the court of appeals, much less before the Commission.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

ROBERT R. NORDHAUS,
General Counsel,

HOWARD E. SHAPIRO,
Solicitor,

MCNEILL WATKINS II,
Attorney,
Federal Energy Regulatory Commission.

JUNE 1978.

DOJ-1978-06

APPENDIX

Section 313(b) of the Federal Power Act, as added, 49 Stat. 860, and amended, 16 U.S.C. 185*l*(b), provides:

> Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds

for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).